

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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Skaar-direct

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2 THE WITNESS: My feeling very much was that he
3 was saying "Here is what I thought and I have been telling
4 my people this. However, they don't necessarily agree with
5 the situation, they feel comfortable with it."

6 I more or less -- this is Mr. Siegel's thinking
7 that is being reported here.

8 THE COURT I understand. I was just trying
9 to get the give and take of your conversation.

10 He was telling you that the bank had done something
11 which he thought the bank shouldn't have done. He was
12 part of this operation. Did you ask him "Well, what did you
13 do to stop it while it was going on?"

14 THE WITNESS: His response to my reaction, "Well,
15 this is somewhat unusual, isn't it," his response was,
16 well, there was public money coming in, as I recall,
17 April or May, and the company said "Don't worry, Ford is
18 coming in down the road on a long-term basis," and he
19 believed at that point on an unsecured basis, which would
20 immediately eliminate his over-advance. So his answer was
21 basically new funds would come in below the line to
22 protect him.

23 THE COURT: Did you get any feeling from your
24 conversations -- it is hard to project back -- did you get
25 any feeling from his conversation what he and his associates

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2 thought at the time these things were happening? Did they
3 think the bank was in peril or did they not?

4 THE WITNESS: Oh, I don't think there is any
5 question that they felt they were in a very serious
6 position, that they were substantially over-advanced, and
7 that they were concerned.

8 Apparently there had been a series of
9 meetings with Topper where Topper had come in and asked
10 "Won't you advance money against these three ~~ineligible~~ *ineligible*
11 categories," and apparently they had prevailed from
12 time to time on Citibank to go ahead and make further
13 advances.

14 But as I understood it, Topper was more or less
15 continually, continuously in violation of the formulas that
16 had been set up, and on that basis, yes, Citibank was
17 concerned about their position.

18 Q Mr. Skaar, your attention to the portion
19 of the memorandum which begins on the fourth page, which,
20 again, is numbered 3, and particularly to the --

21 THE COURT: This is page No. 3?

22 MR DAILEY: Page No. 3.

23 Q -- particularly to the last two paragraphs
24 beginning there and continuing on to the next page, beginning
25 with "in December 1970."

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2 Could you just review that to yourself, please.

3 THE COURT: Beginning with "in December 1970,"
4 is that what you are asking him to read?

5 MR.DAILEY: Yes.

6 A How far do you want me to go?

7 Q If you could just go through the page No. 4,
8 please.

9 Q Are you finished, sir?

10 A Yes.

11 Q Just a couple of questions in terms of possible
12 typographical errors. I call your attention on the page
13 No. 4 -- first, let me back up, sir.

14 The paragraphs beginning on page No. 3 which
15 you have read to yourself, the last two paragraphs, plus the
16 portion on page 4, does that reflect your conversation with
17 Mr. Siegel?

18 A Yes.

19 Q Which you have previously testified about?

20 A Yes.

21 Q All right. Going back, sir, to that portion of
22 the top paragraph on page 4, about two-thirds of the way
23 down, beginning with the sentence "However, the merchandise
24 was not really selling at the retail level. Management
25 diluted themselves" -- that is "deluded", I take it?

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2 A That is right.

3 Q -- "and they kept selling. In August, great
4 pressure was put on Citibank and Topper told their custo-
5 mers to pay for the merchandise they had actually used."

6 Sir, my question to you, is there a typo-
7 graphical error in the phrase "in August, great pressure
8 was put on Citibank"?

9 A Yes. That should be "was put on Topper by
10 Citibank." That's what it means.

11 Q That is what Mr. Siegel told you?

12 A Yes.

13 Q What did he tell you in that connection?

14 A Well, simply, Topper had been in so many times to
15 get their cash shortage relieved and there had been
16 so many discussions about how the over-advances would be
17 eliminated that Citibank now wanted some action and
18 pressure was put on. I assume they told them "No more.
19 Get it down."

20 Q Do you recall anything else about the conver-
21 sation with Mr. Siegel other than what is set forth in the
22 portions you have read?

23 A No, I believe it is, as I recall, pretty well
24 in this memo.

25 Q A fair and accurate summary of what was said

1 jhbr Skaar-direct-cross 1357

2 by Mr. Siegel to you on that occasion?

3 A Yes.

4 MR. DAILEY: No further questions, your Honor.

5 Your Honor, the memo was received in evidence.

6 THE COURT: Yes. There is no objection.

7 CROSS EXAMINATION

8 BY MR. WOLLEN:

9 Q Mr. Skaar, do you recall over what period of
10 time you dictated this over the telephone?

11 A It was over -- you mean the actual length of
12 time the dictation took?

13 Q Was it one phone call?

14 A No, I think it was probably three or four phone
15 calls.

16 THE COURT: Where were you calling from and
17 to?

18 THE WITNESS: From both out at the company's
19 place of business and from my hotel here in New York.

20 Q Over what period of time?

21 THE COURT: Your headquarters were in Detroit?

22 THE WITNESS: In Dearborn, right.

23 Q Over what period of time did that occur?

24 A few days, a week, a month?

25 A I would say the essence of this -- there are

1 jhbr Skaar-cross 1358

2 really two or three different pieces of this memo. The
3 part with Mr. Siegel was probably done in one phone call,
4 and I believe late in the afternoon, from out at Topper's
5 place of business.

6 Q How about the other pieces in the memo?

7 A Over the next couple of days. In fact, the part
8 with Mr. Schwartz I suspect was done the day before.

9 Q Are there any other parts?

10 A Pardon me?

11 Q Are there any other parts in the memo?

12 A Are there any parts other than--

13 Q I thought you said before the memo has several
14 parts and now you referred to two, Siegel and Schwartz.

15 A I have to look here again.

16 THE COURT: These dates at the top I presume
17 are put on by the typist.

18 THE WITNESS: That is correct, sir.

19 A There are some other elements of this that had
20 nothing whatsoever to do with the conversation with
21 Mr. Siegel at the time. There are some parts in here with
22 Mr. Waldman, there was a meeting here where the attorneys
23 for everyone were present. That is all a part of this memo.
24 So there are several parts.

25 Q When you had this conversation with Mr. Siegel,

- 1 jhbr Skaar-cross 1359
- 2 were you aware of the fact that some gentleman from Ford
- 3 had visited First National City Bank prior to the Ford
- 4 investment in Topper?
- 5 A Yes, I was. I was not familiar with how
- 6 extensive, but I knew they had investigated at some point
- 7 along the way.
- 8 Q No. My question was did you know that some people
- 9 from Ford had visited First National City Bank about Topper.
- 10 A Before they made their investment, yes.
- 11 Q You did?
- 12 A Yes.
- 13 Q Who were those people from Ford?
- 14 A I don't know for sure. I assume one was
- 15 Ralph Pompea and the other probably was Walter ~~Finan~~ ^{Finan.}
- 16 Q But you don't know really who they were?
- 17 A No, I don't. I was not at Ford at that time.
- 18 Q And they did not tell you afterward when you did
- 19 come to Ford that they had visited First National City?
- 20 A I assume they probably did and I assume there pro-
- 21 bably was some memo in the file that I probably had read
- 22 reporting on their investigation.
- 23 Q But you don't remember today?
- 24 A Do I remember the memo?
- 25 Q No. You are saying you are assuming. You don't

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remember today --

THE COURT: When you say you are assuming, you are saying that is your ~~best~~ ^{best} recollection?

THE WITNESS: That is correct, sir.

Q Did those gentlemen from Ford ever tell you what documents they reviewed from First National City?

A No. I assume they did a field audit, which is a relatively standard type procedure.

Q Did they ever --

THE COURT: It may be standard, but I don't know what it is. What is a field audit?

THE WITNESS: Well, you send people that have auditing type backgrounds out to review documentation and just really get into what is there, what is reflected in the company's books, and I assume they went to Citibank and looked at what Citibank had, although I do not know that for sure.

Q Did anybody ever tell you that Citibank refused to let the Ford people look at any documents in connection with Topper before the Ford investment?

A I do recall that there had been some reluctance on Citibank's part to look at some documentation, as I recall.

Q Who told you that?

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2 A I think Bill Duncan.

3 Q Was he one of the men who you mentioned as having
4 visited First National City Bank?

5 A No, he was not.

6 THE COURT: Did Ford manage to overcome the
7 reluctance?

8 THE WITNESS: I thought that Pompea and/or
9 ~~Finger~~ ^{Finan} had looked at Citibank's records, but I do not know
10 that for sure.

11 THE COURT: As far as you know, was there anything
12 refused them ultimately?

13 THE WITNESS: I don't know whether they got to
14 see everything they wanted to see or not.

15 Q Do you know if they also visited Topper?

16 A I assume they did.

17 Q Did anybody ever tell you they did?

18 THE COURT: What difference does it make?
19 It is hearsay and it hasn't got anything to do with this
20 testimony.

21 Q Mr. Skaar, I direct your attention to
22 page 4 of Exhibit 1551, page numbered 4. You see that?

23 A I have page 4 here.

24 Q Do you see the next to last sentence in the
25 first paragraph on that page, which reads: "Gross receiv-

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2 ables were approximately \$35 million of which \$17 million
3 were past due and ineligible for one reason or another"?

4 Do you see that sentence?

5 A Yes.

6 Q Did anybody at Ford ever tell you that they knew
7 that before the investment?

8 A To the best of my knowledge, no one ever told
9 me that, no.

10 Q Did you discuss this memorandum with anybody
11 when you went back to Detroit?

12 A This memo had gone back for Bill Duncan's
13 use at Ford and I am sure that pieces of it did get dis-
14 cussed, yes.

15 THE COURT: But you have no recollection one
16 way or another?

17 Q Do you recall that?

18 A Let me say --

19 THE COURT: Do you have a present recollection
20 of discussing it? That is what he wants to know.

21 A There is no doubt in my mind I talked about parts
22 of this with people at Ford when I got back.

23 THE COURT: But you have no recollection of such
24 conversation today?

25 THE WITNESS: No.

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2 THE COURT: You just know as a matter of
3 practice you must have?

4 THE WITNESS: Yes.

5 Q Do you recall writing other memoranda about the
6 Topper situation?

7 A Yes.

8 Q Isn't it correct, Mr. Skaar, that the thrust of
9 your conversation with Mr. Siegel was Mr. Siegel trying to
10 assuage your concern about Ford having been misled into this
11 transaction?

12 A Would you repeat that once more, please?

13 Q I think you testified on your direct testimony
14 that the thrust of the conversation was that Mr. Siegel
15 was trying to dissuade you from believing that Ford was
16 somehow taken, I think was your word. That is right, isn't
17 it?

18 A I don't think he was trying to say to me that
19 Citibank was not taking us. I ~~don't~~ think that is what he
20 was saying.

21 He was simply saying we should not -- all the
22 lenders -- should not have been surprised to find themselves
23 in a very serious position, is what he was saying.

24 Q Did you believe at that time that Ford had
25 somehow been taken?

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2 A At that time I did not feel that Ford had been
3 taken, not at that time, the time of that discussion.

4 Q Directing your attention, Mr. Skaar, to the
5 next paragraph on page 4, the bottom paragraph on page 4,
6 that also reflects your discussion with Mr. Siegel?

7 A Yes.

8 Q Directing your attention to the second sentence,
9 Mr. Siegel told you that the big problem started in November?

10 A Yes.

11 Q And to the next sentence, that First National
12 assumed receivables could be collected in season?

13 A Yes.

14 Q And two sentences later, to the statement that
15 at the end of November Topper realized they were in real
16 trouble?

17 A Right.

18 MR. WOLLEN: I have no further questions, your
19 Honor.

20 THE COURT: You said something that kind of
21 skipped by me. Maybe I didn't hear it right. You said that
22 you gathered that Seigel thought that his associates at the
23 bank thought he was an alarmist or something of that nature.
24 Did you say something like that to me?

25 THE WITNESS: Yes. I had the feeling, it was

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2 just my feeling, that he was saying that he knew there were
3 problems, that he knew because he was involved on a day-to-
4 day basis with the problems and the fact that they were
5 advancing against things that he called soft collateral, that
6 this was not shared by his superiors, that they weren't
7 as concerned as he was.

8 MR. WOLLEN: Nothing else.

9 THE COURT: Thank you.

10 (Witness excused.)

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22 THE COURT: Okay. That is all the evidence.

23 Mr. Bicks, I asked for any memorandum that

24 mentioned Citibank prior --

25 MR BICKS: Yes. Should I address myself to that

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2 now?

3 THE COURT: Yes.

4 MR. BICKS: I thought what your Honor really
5 meant was not prior to the closing but really prior to the
6 decision to go, which is short of the closing.

7 So what I did --

8 THE COURT: Prior to the decision.

9 MR. BICKS: The decision to seek approval to
10 go ahead. In other words, prior to, in the case of the
11 Pension Fund, prior to the end of the first week of Septem-
12 ber, the same with Connecticut Mutual.

13 THE COURT: What I said was the closing,
14 but the decision is the more relevant point.

15 MR. BICKS: I thought that was the spirit of what
16 you wanted. I can do those very quickly now if you want.

17 THE COURT: Okay.

18 MR. BICKS: I will state them for the record and
19 then we have a package for you. Each of them is in evidence.

20 The first document refers -- it is obviously the
21 **P** **P** **M** **r**ivate **P**lacement **M**emorandum -- bears on Citibank and
22 Topper. Indeed, the first page of text in the memorandum
23 recites as a principal risk the fact that the company's
24 operations are dependent in large part on a continuation
25 of its bank borrowings.

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From that first page there is a reference to two other sections of the prospectus which is included in the Private Placement Memorandum, the first reference being on page 12, where the Finance Agreement is described, the second reference being a footnote in the financial. For your convenience, sir, I marked in red those pages and paper clipped the reference. The pages which contain the references were obviously in the possession of each plaintiff early on in its consideration of the Private Placement and that prospectus was also in the possession of Citibank in early '71.

THE COURT: In the possession of Citibank only to the extent that Mr. Siegel said he had seen it.

MR. BICKS: He had it, yes.

THE COURT: I was surprised that nothing was made of that. He just said he had seen it. He didn't say where he saw it in the course of his business or his grandchildren had given it to him or what.

MR. BICKS: He said he had it.

THE COURT: He said he had seen it. One question was asked.

MR. BICKS: That is right.

THE COURT: I was surprised. I thought more would be made of it. It didn't even come out that he had

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2 seen it in the course of his employment.

3 MR.LILLIE: Yes. I might also add, your Honor, my
4 recollection is that he did not recall when he had seen that.

5 THE COURT: He recalled he had seen it before
6 the closing.

7 MR. LILLIE: He said it was possible, yes.

8 MR.BICKS: Yes. I would assume, sir, that any
9 prospectus of a client whose loan you are running --

10 THE COURT: That is a big assumption.

11 MR. WOLLEN: I am sorry. I didn't hear what
12 Mr. Bicks said.

13 THE COURT: He said any prospectus of a client
14 you would see in the course of your employment.

15 MR. BICKS: Yes, sir.

16 THE COURT: That is a big assumption.

17 MR.BICKS: It didn't strike me as such.

18 THE COURT: Okay.

19 MR.BICKS: The second memorandum is PX 1378,
20 which is Mr. Thompson's memorandum of his Friday, August 13th
21 ~~meeting~~ ^{meeting} with Downs and Rose, and there is a reference
22 there, and I quote, "The only real negative in the company's
23 present financial position is the 13 to 14 percent interest
24 rate that is pending on its bank loan."

25 If you recall, it was following that that he met

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2 Mole. Mole said "What about the interest, does this
3 reflect the risk?"

4 Following that you have the Waldman telephone
5 memorandum, which is marked as PX 1379, and I won't
6 characterize that.

7 THE COURT: I am familiar with that.

8 MR. BICKS: That is right.

9 THE COURT: I have heard of that one.

10 MR. BICKS: Following that we have PX 1378,
11 PX 1370, which is the so-called decision memo within
12 the Pension Fund, which is five days after the conversation,
13 which has two references to the bank conversation which I have
14 just marked for you.

15 So far as Connecticut Mutual --

16 THE COURT: You have also forgotten Thomspson's
17 handwritten notes.

18 MR BICKS: I don't have --

19 THE COURT: Didn't he prepare handwritten notes,
20 weren't they put in evidence?

21 MR. WOLLEN: He said he threw them away, your
22 Honor.

23 THE COURT: I thought they were in evidence.

24 MR. BICKS: He said he had a yellow pad.

25 THE COURT: That is right. I was under the

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2 impression that was in evidence.

3 MR. BICKS: So far as Connecticut Mutual is
4 concerned, your Honor, if you recall, ~~there~~ ^{their} involvement
5 so far as the bank was concerned was all via conversation.

6 THE COURT: He had a conversation with
7 Thompson?

8 MR. BICKS: No, no. I can trace that history
9 for you very quickly, and if you would like, I can extract
10 the transcript portions for you.

11 THE COURT: No, no. Just trace it.

12 MR. BICKS: Before Hieronymus' visit to the plant
13 on August 11th he had ~~raised~~ ^{raised} with Inglis the possibility
14 of the bank's going unsecured following the ^Pprivate
15 placement. You recall you asked Hieronymus why did he
16 care, and if not secured, on a term basis, and he explained
17 that.

18 Then following the visit he raised it again with
19 Inglis and some time between the 17th and the time Weir
20 returned from holiday, which was August 30th, again, the
21 week of August 30th, when Inglis was pushing for a
22 decision and questioning Connecticut Mutual when they were
23 going to decide whether to go ahead or not, Inglis said
24 "By the way, the banks are not willing to go unsecured
25 or on a term basis at this time. However, the company

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2 advised me that depending on the results at year end, they
3 may well be willing to consider it at that point."

4 When Hieronymus pushed again Inglis said
5 "You know, that doesn't reflect any lack of confidence in the
6 company on the bank's part. They stuck with the company
7 through thick and thin, and Thompson has checked with the
8 banks and gotten a favorable report on their financial
9 condition."

10 Now, indirectly corroborating that is the fact
11 that Thompson and Hieronymus were receiving the same
12 information from the company with copies indicated. If
13 you remember, Hieronymus first asked for a list of
14 customers and the company sent it to Hieronymus and
15 Thompson. Thompson asked for that break even analysis
16 and the company sent it to Hieronymus as well saying somebody
17 else asked. If you recall, the internal memoranda of
18 Connecticut Mutual do ~~reflect~~ ^{reflect} that early on they were
19 told U.S. Steel was considering the private placement.

20 I think the final conversation involving this
21 or the two final ones that are reflected in the transcript
22 is the Thursday afternoon when Weir came down from having
23 seen Bates and Bates said "It is up to you to decide whether
24 to take it to the executive committee for approval the
25 next Friday morning." Hieronymus then reported to him

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2 the conversation that he had with Inglis about Thompson's
3 check and Hieronymus testified as to Weir's --

4 THE COURT: There was no memorandum about that,
5 that was just his testimony.

6 MR.BICKS: But following that the only -- well,
7 that is in essence the facts. I put those together in a
8 package for you, sir. They are all in evidence.

9 THE COURT: Allright. What is your pleasure?
10 It is my intention --

11 MR. WOLLEN: I am sorry. Before you get to that,
12 at the same time you asked Mr. Bicks to give you any documents
13 that referred to First National City Bank prior to the closing
14 you asked us to consider what information contained on the
15 plaintiffs' charts --

16 THE COURT: But I asked you to do that in a
17 form that could be subject to cross examination.

18 MR.WOLLEN: I am not sure it makes an awful
19 lot of difference, your Honor.

20 THE COURT: I thought you had abandoned my sug-
21 gestion that you call Mr. Jeffers. What I thought was
22 somebody could get up and say what was there and let
23 Mr. Bicks cross examine him, see what effect it would have.

24 MR.WOLLEN: What we have done was simply to check
25 the source material and to determine which of it was

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actually physically in the possession of the plaintiffs as
opposed to being available to them.

THE COURT: All right. Have you given Mr.
Bicks that?

MR. WOLLEN: I have not, no.

THE COURT: Give it to Mr. Bicks and if he
thinks it is accurate --

MR. WOLLEN: I don't think he will have any prob-
lem with it.

THE COURT: My ^{intention}~~intention~~ before we go home
permanently for the day is to outline what I believe to be
the basic issues and what my present inclination with respect
to those issues is.

I am not prepared to do this right now.
I will either hear further argument before I do that or --
I must say I am pretty much aware of your positions. Maybe
it would be more useful to do your arguing afterward, either
now or later.

As I say, these aren't findings. I may adopt
them as findings later. They are just tentative conclu-
sions for you to shoot at. As I indicated yesterday,
my track record is about 75 percent. I adhere to my
preliminary conclusions about 75 percent of the time.

Do you want any more argument before that?

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2 MR. BICKS: I gather your reaction is it would
3 be more useful to hear from your Honor now and then ad-
4 dress ourselves to it to the extent we think it is
5 useful.

6 MR. WOLLEN: That's fine.

7 THE COURT: Okay.

8 I will take a short recess.

9 (Recess.)
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THE COURT: As a preliminary observation, I will

state the obvious, that what I am saying now depends wholly
on what I heard. I have not spent the evenings in-between
our sessions reading material which you have not called to
my specific attention, nor do I intend to spend any evenings
reading it in the future, unless you specifically refer to
it in your briefs in such a way as to tell me to go beyond
your briefs and into the record.

With that background I come to the bottom line
first: If there were rule of court requiring me to decide
the case before lunch and prohibiting me from looking at
anything I have not heard to date, prohibiting me from re-
viewing the testimony, requiring that I make a final decision
as this moment, I would find for the defendant.

The qualifications of that statement are obvious.
The first question, it seemed to me, is, was the plaintiff
calling upon the bank for investment advice? And that
question divides itself into two: First, did the plaintiff
think that it was calling upon the bank for investment advice;
and, secondly, did the bank think it was giving investment
advice. I answer both those questions in the negative.

Of course, practically conclusive, it seems to
me on the first question is Mr. Holt's statement to Mr. Thomp-
son, when Mr. Thompson brought him not his memorandum, as I

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1 recollect the testimony, but gave him an oral report which
2 subsequently went into that memorandum. Maybe it was the
3 other way around. But, in any event, it was brought out on
4 the cross-examination of Mr. Mole, when Mr. Mole said he told
5 Thompson it was none of his business to ask Mr. Waldman whether
6 they ought to make the investment or not. That seems to me
7 practically dispositive of the contention that the plaintiff
8 thought it was getting investment advice from the bank.
9

10 There is also the bank's decision memorandum,
11 1370, which seems inconsistent with such a theory -- our trade
12 and banking checks have been favorable. Well equating trade
13 and banking in the same sentence, clearly they were not
14 getting investment advice from the trade, and in equating
15 trade and banking in the same sentence, suggests to me the
16 routine checks made by banks, which seems to me to have been
17 adequately described by the various defense witnesses.

18 Now, did the bank think it was giving investment
19 advice? Well, here I come up with the fact that Mr. Jeffers
20 was not called as a witness, even though I suggested that
21 would be appropriate. Well, obviously, if counsel does not
22 call someone who is in their control, complete control, and
23 the judge thinks it is going to be appropriate, that person
24 is going to give harmful testimony. That conclusion is
25 Hornbook law. So I tried to conclude what harmful testimony

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Mr. Jeffers could give, and it seems to me it is in one of two areas.

In the first place, I expressed skepticism on Mr. Thompson's testimony to the effect that he had not revealed to Mr. Jeffers that Waldman was the man to talk to, that he did not reveal that to Mr. Mole when he spoke to him. And then when he called Mr. Waldman he had not told him what he knew, but he said, "Tell me about this account."

I expressed skepticism, and it still seems to me improbable. However, I must conclude that Mr. Jeffers if called would have testified that, indeed, Thompson did tell him, "Get me the best man to talk to on this account," because why else didn't you call Mr. Jeffers. So I come to that conclusion. Unless I am persuaded to the contrary, I will so find as a fact.

Now, the last question and the last answer given in this trial may make that fact very significant. I don't think it does, but I call it to your attention for briefing. Certainly, the last answer by the last witness to my question suggested to me quite clearly that had Mr. Thompson called Mr. Siegel, instead of Mr. Waldman, an entirely different result might have followed. Therefore, finding, as it seems to me I must, that Mr. Thompson asked Mr. Jeffers to select for him the person in the bank to talk to, it seems to me

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2 open to the plaintiff to argue that I must assume that
3 Mr. Jeffers made a deliberate selection of the person who
4 would give favorable information, rather than unfavorable in-
5 formation. I don't think I have to come to that conclusion --
6 I don't think it would even be justified -- because official
7 hierarchy being what it is, top dogs go to top dogs, and it
8 is the most natural thing in the world if Mr. Jeffers, who
9 is the top man in one field is asked who to talk to, making
10 inquiries around the bank, he will make inquiries and name
11 whom he did. So my present suggestion is that it is not
12 decisive, but it certainly is an arguable point.

B2 13 The next unfavorable testimony that Mr. Jeffers
14 might give as far as I can imagine is that he would contra-
15 dict Mr. Waldman when Mr. Waldman said he didn't know the
16 relationship between the bank and the Pension Fund. Mr. Wald-
17 man said he assumed the Pension Fund was just a big depositor
18 to whom the bank would have no fiduciary obligation. I sup-
19 pose Mr. Jeffers might have testified that he, on the con-
20 trary, told Mr. Waldman the Fund was somebody to whom the
21 bank did have a fiduciary responsibility. But I don't think
22 that is relevant, and although failure to call a witness
23 entitles the finder of the facts to construe evidence most
24 strongly against the party that does not call him, it does
25 not entitle the finder of the facts to dream up things that

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1 that witness should have said which is inconsistent with
2 the record before him. Furthermore, as a matter of law,
3 I am not sure it would be material.
4

5 The bank's obligation to the Fund is whatever the
6 bank's obligation to the Fund was, and I don't think any
7 internal significance between members of the bank staff can
8 affect that one way or the other.

9 So much for my speculations on why you didn't call
10 Mr. Jeffers and what result can follow from that, and so much
11 for my present thinking on whether the bank was acting in
12 its capacity as an investment advisor.

13 Now, perhaps not completely logical here, but
14 I have got written down in my notes this matter, so I will
15 take it up, the question of negligence and contributory
16 negligence. With respect to that, let me comment on the
17 credibility of the witnesses.

18 Now, point 1: I did not find that any witness
19 before me was telling anything, except the truth as he saw
20 it at the time he was testifying. But as anybody knows,
21 what the witness thinks is the truth at a given time has
22 little or no bearing on what the truth actually is, truth be-
23 ing what the Almighty would tell us happened if the Almighty
24 would break His custom and come down here, and that is with
25 the exception of one witness, and that was Lusk.

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2 All the witnesses, in greater or less degree,
3 showed the normal tendency to remember things in a way that
4 best interested their present position. Mr. Lusk, I must say,
5 gave me a very eerie feeling. From all I could gather, he
6 would just as soon describe what he saw in the Yankee Stadium
7 a couple of weeks ago, which had no bearing on his life one
8 way or the other. He did not seem to be influenced by any-
9 thing, except his not too complete recollection of what
10 happened at the time.

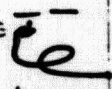
11 The other witnesses all were influenced by the
12 perfectly human tendency to remember things as they would like
13 to have had them occur. Typical of that was Mr. Waldman's
14 testimony before the SEC. He was perfectly positive that
15 Mr. Thompson called him and he had not called Mr. Thompson,
16 and, obviously, he is positive of that, because that is the
17 way his then interest was. However, the net result of that
18 episode was to confirm my confidence in Mr. Waldman, because
19 he handled his cross-examination on that issue in a way that
20 indicated to me that he had not intentionally misled the SEC,
21 but he made a mistake which he was now correcting, and that
22 reinforced my notion that he was trying to tell the truth
23 now and being reasonably successful.

24 Mr. Thompson went to the opposite ~~extreme~~ ^{extreme} from
25 Mr. Lusk. The events about which he was testifying obviously

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1 had had a tremendous emotional impact upon him. I rather
2 gather this was the biggest thing he had ever done at that
3 time and maybe since, and to have it go sour on him within
4 three months of his having done it was obviously a tremendous
5 emotional impact. I don't want to be facetious, but I can't
6 help observing as he was reading those documents, his memo-
7 randa, of learning of the debacle, he reminded me of Patty
8 Hearst watching the film clips of the shoot-out. He was
9 reliving that horrible event.
10

11 Now, contemporaneous memoranda showed that. He
12 went through the obvious desire to find somebody else --
13 and I am not criticizing Mr. Thompson -- but obviously the
14 minute that the debacle happened, he began the process of
15 trying to relieve his emotional feelings by finding somebody
16 else to blame for it, and Citibank, amongst others, was his
17 target. He began to build up in my judgment this conversa-
18 tion with Mr. Waldman from that time on. You recollect I
19 observed on the basis of my reading of the brief that I thought
20 that was remarkably odd testimony he gave before the SEC or
21 wherever, that he called Mr. Waldman and asked him if there
22 was anything wrong, and then waited for a reply. It is not
23 the way you get information from people. And it looked to
24 me as though having failed to ask Mr. Waldman at the time 
25 he never thought to ask Mr. Waldman at the time he was doing

1 mmds 8

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2 the best he could reconstruct the situation, to make it
3 Mr. Waldman's fault for not giving him information which he
4 had not asked for.

5 On the question of comparative negligence, we
6 can't get away from the fact that 20-20 hindsight is a wonder-
7 ful thing, and it is easy to show on the basis of hindsight
8 how you should have done things differently. However, on
9 the basis of contemporary memoranda, I don't see how
10 Mr. Thompson could be freed of negligence. He knew that a
11 problem was Topper's bill and hold and the guaranteed return,
12 that old syndrome. He knew that was the whole problem. He
13 could not help but know that the easiest way to find out what
14 the practice was in the trade was to call someone in the
15 trade, and in one of his trade inquiries he was told that
16 the reason they liked Topper was they were not bastards like
17 other people, who insist on their bills being paid. Those
18 were not exactly the words he used, but that was the impact.
19 Why didn't it occur to him to find out what was in Topper's
20 practice that made them more favorable than the other organiza-
21 tions, I will never know.

B322 In the second place, of course, there was that
23 poignant part in his testimony when he said he was before
24 Jack Rose and he said, "Let us see the documents about these
25 holds and bills," and Jack Rose says, "You got to have lunch

1 made 9 1386
2 with Mr. Ornstein," and that was the last we ever heard of
3 documents. I mean, Mr. Thompson was just hoodwinked by
4 Mr. Rose, and in circumstances which it seems to me a person
5 having a responsible position in a 3 billion-dollar fund
6 should not have been.

7 Now, we come to the negligence of Citibank, and
8 there again it does not take an expert to tell you that on
9 the basis of hindsight they should not have been in this
10 situation. The question is, as a matter of foresight,
11 shouldn't they? On that issue, negligence, of course, is
12 living up to the standards in the community of like, similar
13 organizations, and on that we have the testimony of two
14 expert witnesses.

15 As a finder of facts I've got to choose between
16 them. I must say I found Mr. Silverman to be a hundred per-
17 cent more persuasive than the plaintiffs' expert witness for
18 several reasons. In the first place, he seemed more knowledge-
19 able in the field that he was specifically directing himself
20 to. Both of them, I will say at the outset, struck me as
21 persons of integrity. Mr. Silverman seemed more knowledge-
22 able in the field that he was addressing himself to, and, in
23 the second place, he was talking about this case, and not
24 some hypothetical case off on Mars somewhere.

25 Now, the rules of evidence have been changed

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1 after a great deal of pulling and tugging to prevent the
2 rather idiotic process of hypothetical questions addressed
3 to an expert, and permitting the expert to examine the facts
4 fully in issue and express an opinion on them. Provided the
5 plaintiff elects to use the old archaic methods, I can only
6 suspect it was similar to the bank decision not to call
7 Jeffers. That would not have helped them.

8
9 Mr. Silverman impressed me as a knowledgeable,
10 forthright witness. He examined in detail all the documents
11 before us. I note there was a technical defect in his
12 testimony, but as it was not called to my attention by objec-
13 tion, I assumed it was not important. He talked about having
14 examined the documents of the bank; he didn't say documents
15 in evidence. Well, I assume that every relevant document
16 is in evidence, and as Mr. Bicks didn't make any objection
17 when he said he examined documents in the bank, I assumed
18 he meant he examined these documents in evidence, and that
19 that is what his testimony was based on. In the first place,
20 I can't conceive of any relevant document that is not in
21 evidence. And, in the second place, Mr. Bicks has been around
22 a while and made no objection. So I assume that he assumed,
23 as I did, that it was documents in evidence he was talking
24 about. He said he made a detailed examination of the documents
25 in evidence and in his judgment the bank's conduct was proper--

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2 I don't remember the exact words -- but, certainly, he led
3 me to believe they had not been negligent. And I was looking
4 forward to what cross-examination he would be subjected to,
5 and he was subjected to none. So his testimony stands un-
6 challenged.

7 The only question he was asked in substance,
8 did he remember what the rate of returns was, and he said
9 he didn't remember. It seemed to me a wholly inconsequential
10 answer. He didn't say he had not considered it at the time;
11 he said he didn't remember it now. None of those charts
12 were shown to him. His testimony was not challenged in any
13 way.

14 I, of course, as I continually tell juries, have
15 to pay attention to any expert, but I did find him persuasive.
16 I did find him knowledgeable, forthright, and I see no reason
17 for not accepting his testimony.

18 On the other hand, the plaintiffs' expert by
19 hypothesis had to qualify every answer he gave, because all
20 he was being asked to express an opinion on was a particular
21 segment of a hypothetical question. And as between the two,
22 I don't think he made a dent in the presentation made by
23 Mr. Silverman.

24 Now, really, what duty does the bank owe to the
25 plaintiff? I am not prepared to rule on that, because I have

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2 not studied it. It seems to me the strongest thing that the
3 plaintiff has going for him is that Mr. Waldman obviously
4 knew that the bank was going to get this money. Now, what
5 additional obligation did that impose upon him? My inclina-
6 tion is it probably did not impose upon him any greater duty
7 than he had to his own client, his own employer.

8 On the basis of the testimony, it is my tentative
9 conclusion that he in good faith gave to Mr. Thompson the
10 same answer that he would have given to a superior in his
11 own bank at that time. That is tentative, as I say; it is
12 based on his testimony. He said, in substance, that was the
13 fact.

14 I will say at this time that even before the last
15 witness testified, Siegel gave me more pause than any of the
16 other witnesses; he gave me more of an impression of defend-
17 ing himself. Again, I don't say I thought he was lying today,
18 any more than I think Thompson was lying, but he did give
19 me more of an impression of needing to defend his position
20 internally than either of the other witnesses. I told you
21 Lusk seemed to me an oddity in that respect. Waldman, as I
22 have noted, had that tendency in common with most people.
23 Siegel seemed to be more burdened by it. Of course, we found
24 out with the last witness why, because, obviously, Siegel had
25 been worried while these things had been going on, and he is

1 now trying to forget that he was worried, because if he was
2 worried, why didn't he do something to save his bank 10 million
3 dollars, or whatever the amount was. If the plaintiffs could
4 get me to accept or the Court of Appeals to accept that
5 theory, make it proper for me to find that Mr. Jeffers selected
6 Waldman, rather than Siegel, for the purpose of getting Wald-
7 man's views to the purchaser, rather than Siegel's, that
8 would be raising an interesting question. But the bottom
9 line is, I have tentatively accepted Waldman's testimony
10 that -- I don't think he said these words -- but from his
11 testimony I draw the conclusion that had any officer of the
12 bank asked a question of him, had asked the same question
13 of him as Thompson asked him, he would probably have gotten
14 substantially the same answer, and if I am correct in my
15 conclusion, it would seem to me to follow as a matter of law
16 that the Fund was entitled to nothing better. And the fact
17 that the bank was getting this \$3 million placed an additional
18 obligation on Waldman, is something I will hear.

19
20 Then there is the question of controlling person.
21 Now, I am not going to make any finding, tentative or other-
22 wise, on the question of law as to whether the situation in
23 which the bank found itself was that of a controlling person.
24 I make no intimations on that, because I am wholly ignorant
25 on the subject to know what you have to be to be a controlling

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2 person. I have gone through these briefs and nothing else.
3 However, I gather from the briefs that if you are a controlling
4 person you are responsible for any misfeasance of your
5 controlee to the extent you know about it. And my tentative
6 finding of fact is that there is no evidence that the bank
7 had any knowledge whatever of what representations Topper
8 was making to the lenders. The only thing that even touches
9 on that is the fact that Mr. Siegel, I think, had seen the
10 **P**rospectus -- was it Mr. Siegel -- he had seen the printed
11 prospectus that was issued in connection with the public
12 offering. That was all that was said about it. There is no
13 suggestion why he saw it; there was no suggestion he saw it
14 on the bank's premises; there is no suggestion whether he
15 is on somebody's mailing list, or that one of his grandchildren
16 might be doing a study of investment finance at some prep
17 school, and there is no suggestion he mentioned it to anybody
18 at the bank.

19 All the evidence shows is that he, Mr. Siegel,
20 saw the **P**rospectus. There is no suggestion that he knew any-
21 body else had ever seen the **P**rospectus; there is no sugges-
22 tion that he knew private **placement** purchasers were interested with
23 that prospectus. So unless something has missed me, I would
24 make an ultimate finding that there is no evidence that the
25 bank had any knowledge of what, if any, representations were

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2 being made to the plaintiffs.

3 Now, what the consequence of that observation is
4 I have no way of guessing, because I know nothing about
5 control persons.

6 I have laid out everything that I can think of
7 for you to shoot at. If anybody wants to say anything now,
8 I will listen to them. If you don't, I won't hold it against
9 you. Or if you want to come back after lunch, I will come
10 back.

11 I will say one final thing.

12 MR. LAST: Your Honor, if I may --

13 THE COURT: I will say one final thing, whatever
14 the Fund can get on any theory, except the investment advice
15 theory, that contract theory, inures to your benefit. Wald-
16 man knew there were people putting up money and that money
17 was coming to him in one hunk, and to the extent that he had
18 any obligation to be truthful, to be accurate, to be careful,
19 to be anything, it would inure to the benefit of everybody to
20 whom that information went.

21 MR. LAST: Your Honor, I think we see here what
22 may happen when a plaintiff uses one of its many points and
23 puts emphasis on it before the finder of the facts, using
24 live witnesses, when the whole record, the whole documentary
25 record, presents a legal case in its favor. What I mean by

1 mmds 16
2 that is that this whole business of fiduciary relationship,
3 the duties which were owed by a fiduciary is really not
4 essential to this case, and that you have spent a good deal
5 of time deciding what the bank owed and for what reason to
6 the investors.

7 You have found that Waldman knew the bank was
8 to receive the money which the plaintiffs put into this. If
9 you will proceed from there and say and find that no investor
10 in his right mind knowing what the bank knew would ever put
11 a dollar into Tonner, then you find a combination of two
12 things: A benefit that was to be derived by the bank from
13 this investment --

14 THE COURT: But I can't find that. United States
15 Steel knew what the bank knew and put money into Tonner; the
16 bank kept putting its own money in, secured, to be sure.

17 MR. LAST: I don't think United States Steel knew
18 or anybody knew what the bank knew. I don't even think that
19 those in Tonner knew what the bank knew.

20 THE COURT: What did the bank know that Tonner
21 didn't know?

22 MR. LAST: The bank knew that Tonner was in a
23 very serious financial condition. Now, that is the least that
24 we can get out of all the evidence that we have adduced here
25 over these days. Tonner was in serious financial condition

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by anybody's definition. The bank needed to have paid down some of the obligations, some of its loans. The bank, therefore, not only didn't prevent Topper from committing this fraud, but participated in it by aiding and abetting them.

B5 THE COURT: The bank answered one question in a five-minute conversation. I find the fact that that conversation was five minutes and not fifteen minutes. The bank had a five-minute conversation with a man named Thompson. That is all the bank did that I know of in the whole conversation.

[sic: Private Placement]

MR. LAST: Your Honor, I have no connection with Mr. Thompson. My people, without any connection with the bank, have sued the bank. My people were investors. They had an investment advisor, who strongly urged them to buy this without any information.

THE COURT: You settled with him, or I think you have.

MR. LAST: Our basis for coming here, we are asking the bank to respond to us on the basis that they knew that this money was going to be invested by some private lenders who couldn't possibly lend if they knew what the bank knew, that there was no longer any collateral of any kind.

THE COURT: But the bank didn't know that, at least, I have so found, that the bank didn't know that; I have

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2 found that the bank didn't know that these returns were of
3 right. With 20-20 hindsight I say they should have ^{known} ~~known~~ it,
4 but they didn't.

5 MR. LAST: The bank's own figures show how much
6 ineligibles there were.

7 THE COURT: And Mr. Silverman has testified that
8 in his judgment that was a proper business judgment to make,
9 and nobody cross-examined Mr. Silverman, and nobody has put
10 in evidence in opposition. How could I say any sound person
11 in his right mind would do that?

12 MR. LAST: If you would just dwell on Mr. Silver-
13 man's testimony for a while, he gave his opinion on what
14 good practice would be for a secured lender. Now, a secured
15 lender does not always have a bridge loan of this kind.

16 THE COURT: Mr. Silverman knew about that bridge
17 loan: he was not asked any ^{questions} ~~question~~ about it.

18 MR. LAST: When he says they acted properly, doesn't
19 he conclude properly when you consider that you are going to
20 get public funds and the proceeds of a private placement?

21 THE COURT: Is it your position that the banks
22 should have taken an ad in the Wall Street Journal and said,
23 "Nobody under any circumstances should invest in Topper"?

24 MR. LAST: It did not have that obligation, but
25 they had an obligation not to conduct itself in such a way.

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2 THE COURT: How? You said you eliminated Waldman's
3 talk to Thompson. Now, what else should the bank have done?

4 MR. LAST: The bank was anticipating --

5 THE COURT: Just answer my question. Lawyers
6 have the damndest practice of not answering a question. Just
7 what should the bank have done?

8 MR. BICKS: May I respond?

9 MR. LAST: Your Honor, I find it difficult to
10 answer that question in the way in which it is put. I could
11 say what the bank should not have done.

12 THE COURT: What should it not have done?

13 MR. LAST: The bank produced a situation where it
14 was calling for --

15 THE COURT: No, no, what should it not have done?

16 MR. LAST: It should not have encouraged this
17 lender.

18 THE COURT: How did it encourage this lender?

19 MR. LAST: The bank might very well have said,
20 "I will cut you water off; I will not lend you any more money
21 in this situation."

22 THE COURT: That is what Silverman said it should
23 not have done. Silverman said the bank acted properly, and
24 I accepted that. He was not cross-examined; he was not
25 disputed, except on a hypothetical basis, and he said that

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2 the bank acted properly with respect to its lender. Now, what
3 should it have done beyond that?

4 MR.LAST: There was some other testimony here
5 which I thought was very significant by the last expert witness,
6 who said, well, sometimes a lender does not want to call in
7 a loan.

8 THE COURT: Sometimes? But he said nothing about
9 this situation.

10 MR. LAST: Whatever the motive was, Citibank was
11 in a position to know that this was a bad business.

12 THE COURT: Getting back to my question, what
13 specific action should they have taken or not have taken?

14 MR. LAST: They should have called the loan in;
15 they should have declared a bankruptcy when it did occur;
16 they should not have conducted themselves so we continued
17 to think they were capable of getting credit.

18 THE COURT: I find against you on that, but you
19 have your point made in the record.

20 MR. BICKS: Are we to state our differences on
21 the record now?

22 THE COURT: It is your option to do it now or
23 after lunch, if you want to.

24 MR. BICKS: I will be pleased to address myself
25 to what your Honor said.

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2 THE COURT: Do you want to come back?

3 MR. BICKS: No.

4 THE COURT: You are not going to do it now; I
5 am going to lunch. I will come back after lunch if you want
6 to. It is now 1:00 o'clock.

7 MR. WOLLEN: I would like to talk to Mr. Bicks.

8 THE COURT: The afternoon is yours.

9 MR. BICKS: I thought you had a trial this after-
10 noon?

11 THE COURT: That canceled itself. The afternoon
12 is yours. If you think it's better to let the matter rest
13 now and do your arguing by brief and then call for another
14 session and have some oral argument, I am willing to do that.
15 Or if you want to make oral argument after lunch, I am willing
16 to do that. The afternoon is entirely yours.

17 Do you want to consider taking a luncheon break
18 and then ask me to clarify what I have said for your own
19 benefit in writing? I am not being facetious.

20 MR. BICKS: Why don't we meet again after lunch?

21 THE COURT: We will meet again after lunch, and
22 if you want to tell me something, all right.

23 MR. BICKS: It might be useful.

24 THE COURT: We will come back at 2:15. If you
25 decide you don't want to do anything then, I won't be offended.

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2 If you want to spend the whole afternoon, that is fine.

3 (Luncheon recess taken.)

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Connell 1
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jhs

1400

AFTERNOON SESSION

Thl 3
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p.m. 4

2:25 p.m.

5 THE COURT: Before you start, Mr. Bicks -- you
6 are standing so I assume you are going to say something --
7 before you start I want to correct something.

8 My law clerk called my attention to the fact I
9 misspoke in colloquy with Mr. Last. I said what did the
10 bank know that Mr. Thompson didn't know. Obviously what I
11 meant was what relevant fact did the bank know which wasn't
12 available to Mr. Thompson upon proper inquiry.

13 As usual, when one makes a slip one discloses a
14 bit of their thinking, so I will disclose the underlying
15 thinking that caused me to make the slip, namely, it had
16 seemed to me -- and the reason I bring it up is in case I am
17 in error you can correct me -- it seems to me that the crucial
18 fact that should have been found out, and would have stopped
19 everything had it been found out, was that these receivables
20 were not indeed receivables, that they were subject to an
21 agreement to take returns. They were consignment merchandise,
22 when you boil it all down.

23 That is a fact. As far as I can tell, the bank
24 didn't know it, and it seems to me it was equally accessible
25 to Mr. Thompson as to the bank. Indeed, it seems to me more

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accessible.

Although no one made this point, it seems to me common sense -- and here I would be happy to be corrected -- that the bank was under constraint in this area. The bank had a non-notification account and therefore without valid reason it would seem to me the bank would have been subject to considerable criticism if it started calling up its client's customers and inquiring about their affairs, whereas Mr. Thompson was absolutely under no constraint. Nothing in the world could be more natural than for a man about to invest \$3 million to call a customer and ask the circumstances of the accounts receivable, and had he done so he would obviously have gotten correct information. The customers weren't hiding it. They were proud of it.

Also, the way Mr. Bicks referred to my comment to you about you made your record sounded as though he thought I was kind of cutting you off. I wasn't. I was saying I thought you had made it very clearly, and I think it's a very intriguing point, but rightly or wrongly, I rule against you.

MR. LAST: Very well.

THE COURT: You were standing so I assume you want to say something.

MR. BICKS: If it's appropriate.

THE COURT: Yes.

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1402

2 MR. BICKS: To refer to the typo in Mr. Skaar's
3 memo with regard to dilution when he meant delusion, I hope
4 I am not operating under any delusion, I don't believe I am,
5 in presuming to address you now, following your pre-luncheon
6 comment, because the principal points to which I would like
7 to address myself go really to a difference of how the issues
8 are framed.

9 I wouldn't really suppose it is appropriate at
10 this point for me to offer any comment on your observations
11 on the various witnesses and I wouldn't intend to do that.

12 THE COURT: Anything is appropriate. Anything
13 that you think will persuade me that I am wrong is appropriate.

14 MR. BICKS: I really --

15 THE COURT: And one step further, anything that
16 will lay the groundwork to persuade the Court of Appeals
17 that I am wrong is appropriate.

18 MR. BICKS: I really think that observations as
19 to witnesses are your function.

20 THE COURT: Yes, but it's certainly acceptable
21 to point out to me where I should have come to a different
22 conclusion and the reasons for it.

23 MR. BICKS: I would like to try a little different
24 approach, if I may. I would like to accept everything you
25 have denominated as a fact-finder for this purpose and go

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2 further and say that every fact that you haven't referred to
3 that may be relevant to the issues as I frame them, you will
4 draw every inference the record permits adverse to plaintiffs,
5 and address myself on that assumption, which I think is the
6 only way any exploration of the issues will make any sense
7 at this point, and if I reach the conclusion that it won't,
8 then I really will take the liberty of just sitting down and
9 we will proceed from there, but I would like to try to
10 explore the issues, because my reaction, frankly, is that is
11 the principal difference we would have with what you said.

12 I frame the issues before us really in terms of
13 the settled 10b-5 law. Have the plaintiffs shown that Citi-
14 bank either knew the material facts that were misstated or
15 omitted, should have realized their significance. That's
16 really it.

17 In the process of addressing myself to the issues
18 and the facts, I really would like to start to refer only to
19 the facts which haven't been controverted.

20 THE COURT: You know, if I interrupt you with
21 ideas, it doesn't necessarily mean I am disagreeing with you.
22 I am just trying to explore --

23 MR. BICKS: I understand. I view this very much
24 in the nature of argument and I don't want to abuse the
25 privilege in any way.

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THE COURT: I always tell my law clerks that when I shout that means I am uncertain.

MR. BICKS: In the process of treating the facts and the issues, I would like, if I may, to touch on the way your Honor framed the issues before lunch, because I think that should be rather illuminating in terms of any dialogue.

We are talking about a case brought not by a secured lender but by somebody who bought an unsecured debenture that was convertible.

THE COURT: Let me interrupt just to clarify. Are you going to argue Mr. Last's position that we forget the telephone conversation and go on from there or are you arguing the telephone conversation?

MR. BICKS: I certainly think the fact of the communication between the Pension Fund and Citibank and the substance thereof in the context of this transaction is material.

THE COURT: Yes. Mr. Last's position was that telephone conversation didn't have to have happened at all and he still has a case. You are not repudiating that, but that is not what you are arguing now.

MR. BICKS: No, that is not our position. That is really the conspiracy of silence, the lulling of silence issue. There is law on that and it's a more or less

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2 interesting question, but it's not our case.

3 THE COURT: Right.

4 MR. BICKS: I don't think.

5 What was essentially a potential purchaser of
6 those notes interested in? He was interested in the present
7 state of Topper's business and its likely future. It's just
8 obvious.

9 What were all of them told about it? They were
10 given a prospectus. The prospectus talked about audited
11 financial statements up through the end of '70, talked about
12 a spring program that you have heard about I fear ad nauseam
13 here.

B2 14 The Prospectus was finished in late April. The
15 Private Placement Memorandum was essentially a short update.
16 It was written in May. It had some projections in it, but
17 the guts was the Prospectus of the Private Placement Memo-
18 randum. You have it and can decide for yourself. I think
19 that is a fair characterization.

20 THE COURT: I haven't studied this to analyze it,
21 but were I asked to give an opinion right now, I would say
22 the Private Placement Memorandum in addition to the Prospectus
23 merely brought the prospectus up-to-date and fleshed it out.

24 MR. BICKS: I think that is a fair characteriza-
25 tion. The private placement arrangement was finalized, I

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2 think the testimony was fairly undisputed, the last week in
3 June. So you really have a five or six-week update from there
4 and some projections.

5 The point is what did that say. That is the first
6 impact, that is the first thing everybody interested in this
7 saw. It talked about a Spring Program, it talked about a
8 very satisfactory reception in the first quarter, that the
9 customers were reordering Dawn merchandise, and that the
10 reception of the spring program indicated that there was going
11 to be a stability to Topper's business year-round which
12 should increase it's appeal from an investment point of view
13 if for no other reason than decreasing the down side risk
14 stemming from the heavy Christmas solurge and the all or
15 nothing aspects of staking the business success on how it
16 did on the year on Christmas. In addition you had Sesame
17 Street.

18 Each of the plaintiffs got that. They proceeded
19 in diverse ways to satisfy themselves as to various avenues
20 and inquiries which each of them deemed relevant as to whether
21 this was a sensible investment.

22 THE COURT: Of course, I am proceeding on the
23 theory that the bank didn't know that the plaintiffs had this
24 material.

25 MR. BICKS: Had the Priate Placement Memo.

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2 THE COURT: Right.

3 MR. BICKS: Let me get that out of the way right
4 now. We cannot establish that the bank played any role --

5 THE COURT: I go a step further. They didn't
6 know it. They could know it without playing a role in it.

7 MR. BICKS: I will go a step further than that
8 with you. We can't prove they knew of the contents of the
9 Private Placement Memorandum. I think we don't have to prove
10 that as a matter of industry practice every private placement
11 has a memorandum.

12 THE COURT: They had some memorandum, but they
13 didn't know what was in it. For all the bank knew, this memo-
14 randum might have said don't invest in Topper without check-
15 ing with the customers.

16 MR. BICKS: If I may, I think everybody knew there
17 was some private placement memorandum, and it's also fairly
18 clear in terms of the ABA's recommended procedures for hand-
19 ling of a private placement that every private placement
20 memorandum includes in it the last ^{effective} ~~effective~~ prospectus.

21 THE COURT: I have found that there is no evidence
22 that the bank knew about the ^P prospectus.

23 MR. BICKS: On that point, and I don't mean to
24 at least assume to break my commitment to you not to cavil with
25 the facts --

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2 THE COURT: I want you to cavil. That is what
3 I am here for, to be cavilled with.

4 MR. BICKS: I really don't think it makes a whit
5 of difference who in the bank had the P prospectus, as long as
6 the prospectus was there.

7 THE COURT: There was no evidence that it was
8 there. There was one question that Mr. Siegel saw it, no
9 evidence he saw it on the bank's premises, no evidence he
10 saw it anywhere. So far as I know, there is no evidence that
11 this prospectus ever went on the bank's premises.

12 I grant you that it is unlikely that that is so,
13 but there is no evidence as far as I am aware that this
14 prospectus ever touched the bank's possession, premises or
15 anything else. I have ruled as a matter of law that
16 Mr. Siegel's testimony on that doesn't establish it.

17 MR. BICKS: Right. By touching, you mean he saw
18 it without touching it?

19 THE COURT: He saw it, but there is no evidence
20 he saw it on the bank's premises, there is no evidence he saw
21 it qua employee of the bank, and it's your fault. I mean not
22 you personally, but further questions of Mr. Siegel would
23 have established that, if it's true.

24 For all the record shows, his grandson showed it
25 to him in connection with a little project they were doing

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2 in school.

3 The reason I raise that analogy is because my son
4 is now engaged in such a project.

5 MR. BICKS: I would like to check the record.

6 THE COURT: I may be wrong in my recollection.

7 MR. BICKS: There is deposition testimony that he
8 had it and discussed it with Lusk. I think that is part of
9 the excerpts that are in. I frankly think --

10 THE COURT: If he had it and discussed it with
11 Lusk then there is evidence that the bank knew it.

12 MR. BICKS: Sir, there is that testimony, but I
13 frankly would argue the same without it. You have ruled on
14 that.

15 THE COURT: You might argue the same, but you
16 wouldn't have the same reception. If there is evidence
17 that he discussed that with Lusk then the bank knew it.
18 Whether that changes the result or not --

19 MR. BICKS: If I may, that has been the deposition
20 testimony, and that he pointed out the risk factor.

21 THE COURT: Okay. If that part of the deposition
22 is in the record, and if not, you can put it in --

23 MR. BICKS: I frankly did not attribute the weight
24 to it and I am appropriately guided by your comment.

25 Let's proceed from there. What are the essential

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2 questions? Were there serious business problems at Topper
3 in the summer of 1971 from the point of view of a prospective
4 purchaser of unsecured debentures?

5 Second, if there were, was Citibank aware of those
6 problems?

7 And third, if Citibank was aware of those problems,
8 upon Mr. Thompson's inquiry did Citibank fairly state or
9 characterize the nature of the facts in its possession?

10 That's all. So we begin and end in there.

11 How does that differ from the issues as you phrased
12 them?

13 THE COURT: It differs in this way: You stated
14 it more expertly than I have, because that is the issue I
15 tried to state.

16 MR. BICKS: If I may, I perceive them a little
17 differently. You said, to take your last one first, because
18 with none of these issues have I gotten to the investment
19 advice question --

B3 20 THE COURT: No, no. That is a different point.
21 I have assumed for this argument you are not arguing the
22 investment advice question.

23 MR. BICKS: I think the relationship is relevant
24 in terms of the reasonableness of the reliance on this first
25 point. I mean, I think you deal with a communication from

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2 an institution with whom you have dealt satisfactorily for
3 20 years rather differently than you deal with a communica-
4 tion --

5 THE COURT: That well might be, but I would think
6 that would be the same if it was just a depositor, you have
7 been a depositor for 20 years.

8 MR. BICKS: That's right, on this first one.
9 That's right. I am just taking first a straight 10b-5, simple
10 garden variety.

11 Your third point, your Honor, I think is a good
12 departure for analyzing the differences here between the way
13 I think you view the issue and the way I have phrased it.

14 You said, "I listened to Waldman and I believe
15 if a superior asked him were there any problems in Topper
16 in 1971 he would have answered the same way as to Thompson."
17 Is that what you said?

18 THE COURT: That's correct.

19 MR. BICKS: I would take the position that is
20 absolutely irrelevant.

21 THE COURT: If that is true as a matter of law
22 you have gotten somewhere.

23 MR. BICKS: All right. Let me tell you why, on
24 one assumption, if I correctly understood, that his superior
25 would be asking him the question from the point of view of

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2 a secured lender. It would be relevant if the superior was
3 a trustee of the university buying the notes, but I assumed
4 you weren't postulating that.

5 THE COURT: No, no. You put your finger right
6 on the issue that I left open.

7 MR. BICKS: That is what I thought. I wasn't
8 being facetious when I said I didn't think I was deluding
9 myself, because I really sensed we are talking essentially
10 about a legal issue here.

11 THE COURT: Yes.

12 MR. BICKS: If I perceived it correctly that in
13 the third question you are postulating the superior was a
14 superior in the bank who wasn't considering purchasing the
15 notes --

16 THE COURT: That's correct.

17 MR. BICKS: Because I think how I address myself
18 to that bears on the reaction to Mr. Silverman's testimony.

19 THE COURT: Yes, because Mr. Silverman was talking
20 solely in the capacity of a secured lender.

21 MR. BICKS: That is the way I read it.

22 THE COURT: We agree.

23 MR. BICKS: I felt that was completely irrelevant,
24 because we are not claiming here --

25 THE COURT: It is completely irrelevant if you are

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2 correct that Mr. Waldman had a higher duty to Mr. Thompson
3 than he had to his own superiors.

4 MR. BICKS: No, sir. I think it's completely
5 different.

6 THE COURT: Different duty, right.

7 MR. BICKS: Completely different.

8 THE COURT: That is the whole question. If you
9 can show me as a matter of law that Mr. Waldman had -- you
10 call it different I call it higher; it's a matter of semantics--
11 different duty to Mr. Thompson than he had to his superiors,
12 I have to rethink my whole conclusion.

13 MR. BICKS: I think a superior would be interested
14 in a different thing. I am not taking the position that
15 Mr. Waldman acted with Mr. Thompson in any way that was in-
16 consistent with the bank's best interests.

17 THE COURT: No, no. I disagree with you there.
18 Mr. Waldman would have to have given his superior an honest
19 answer to the question of were there any problems in sight.
20 That is wholly irrelevant to anything else. Then the superior
21 could have used his judgment as to what to do next.

22 MR. BICKS: I would say this to you on that point:
23 I don't know what you mean by problems in sight. Problems
24 in sight assuming that the debenture money comes in and there
25 is a \$5 million cushion below the secured line. You then get

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2 the question, which I think is most relevant, does what
3 Mr. Waldman thought make any ^{difference} ~~different~~ at all?

4 We then get back to the colloquy Brother Craco
5 and I had before you -- it seems like a hell of a long while
6 ago, but I think it was only five or six weeks ago -- where
7 I think we both agreed, and you did, that the essential
8 test of materiality is what would a reasonable investor think
9 was important. After all, this isn't a criminal trial of
10 Ed Waldman.

11 THE COURT: No, no.

12 MR. BICKS: So let's look at the problems at
13 Topper, look at what Citibank knew about them, and look at
14 what the undisputed testimony about what Waldman said is.
15 That is all that I think counts. That is all.

16 What were the problems in Topper? I really don't
17 want to go through the whole litany of the past week, but
18 I think we can agree that as of the summer of '71 there was
19 a \$10 million short-fall in their projections, I think we
20 can agree that the receivables more than 60 days past due
21 had gone up 300 percent from the end of June to the early
22 part of August, I think we can agree that Topper believed
23 the reason for that was that the customers hadn't sold Dawn
24 dolls. I don't think there is any dispute --

25 THE COURT: No, that is perfectly clear.

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2 MR. BICKS: -- as to that.

3 I think we can agree in terms of the problems
4 at Topper that you not only had a real slowdown in collec-
5 tions stemming from a failure to sell, but as of June, May,
6 they were the limits of what the bank thought it could go,
7 and if you remember, the ^Prospectus said, "We are dependent
8 on bank borrowing here."

9 Each of those facts is directly opposite to what
10 defendants had been told and the truth with regard to each
11 of those facts --

12 THE COURT: Told by whom?

13 MR. BICKS: Told in the ^Prospectus.

14 THE COURT: Waldman didn't know that.

15 MR. BICKS: Let's get to Waldman, if we may.

16 Those are the facts, the problems at Topper. So let's put
17 that away. That's undisputed.

18 THE COURT: Yes.

19 MR. BICKS: Okay. What did Citibank know about
20 the problems? Everything I have said.

21 In addition, what else did Citibank know, and
22 this too is ^{undisputed} ~~undisputed~~.

23 THE COURT: Could Waldman, the fellow this conver-
24 sation was with, could he have reasonably believed that he
25 was being ^{asked} ~~ask~~ for all this kind of information in a five-

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2 minute conversation, or even 15? Up it to 15.

3 MR. BICKS: We are taking your finding. This
4 could have been two minutes.

5 Forget Waldman. We are talking about institutions.

6 THE COURT: We can't forget Waldman. Mr. Thompson
7 didn't think he was talking with a disembodied institution.
8 Mr. Thompson thought he was talking to the credit manager.

9 Could Mr. Thompson reasonably have believed that
10 the credit manager was about to give him all this information
11 that you just told me about in a 15-minute -- extending it
12 to 15 minutes -- telephone conversation? Is that a reasonable
13 thing for me to believe?

14 MR. BICKS: Can I continue along?

15 THE COURT: Yes.

16 ~~MR. BICKS: Can I continue along?~~

17 ~~THE COURT: Yes.~~

18 MR. BICKS: Because I really think that the un-
19 disputed facts with regard to the conversation and what
20 preceded it in terms of the legal issues help deal with the
21 obvious concern you have as to the nature and significance
22 of this conversation.

23 THE COURT: If you were only entitled to have me
24 dream up what Mr. Jeffers would have said and act on my dreams
25 I would have a verdict for you right away.

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2 MR. BICKS: I am not urging you to do that, sir.
3 I haven't asked you to draw one inference from the failure
4 to call Jeffers and I don't intend to.

5 THE COURT: I have already drawn one.

6 MR. BICKS: I don't think you have to. Let's
7 just stick to what the undisputed facts are. Forget inference.
8 That you do against us. That is the assumption.

9 THE COURT: All right.

10 MR. BICKS: So ^{we've} ~~we~~ got the problems, which we ad-
11 mit are undisputed, and which we agree Citibank knew about,
12 and they are the problems that in fact led to Topper being
13 belly-up 70 days later.

14 THE COURT: Okay. One fact which led to Topper
15 being belly-up -- it might not have been belly-up-- would be
16 were these bona fide receivables.

17 MR. BICKS: Let's get to that. I sense this has
18 been troubling you, as it, indeed, preoccupied us when we
19 first go into the case.

20 THE COURT: If I am wrong in that set me right.

21 MR. BICKS: We hardly made anything of that in
22 our case, did we, the rights of return? Let me tell you why:
23 Because I really came to the conclusion, having lived with
24 it for a while, that practically they were irrelevant to
25 what happened.

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2 THE COURT: Let me tell you why I thought they
3 were relevant and then you tell me why they are not.

4 The customers included Kresge, among others,
5 included persons whom, as you brought out, were people of
6 unquestioned solvency, and if he had real receivables against
7 those people why would he have gone belly-up?

8 MR. BICKS: Let me tell you why, exactly why,
9 and this is key. I think it's a mistake to focus on these
10 23 or 25 written agreements that all of us have come across
11 in the case of discovery. On this point I really believe
12 Pierce. I read his deposition to you.

13 THE COURT: Who is Pierce?

14 MR. BICKS: The sales manager of Topper.

15 THE COURT: Have I heard it?

16 MR. BICKS: I read it to you.

17 THE COURT: What did he say?
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MR. BICKS: He said, "You know, we had a customer named Sears-Roebuck, a very big customer, and we sold him some merchandise, and they couldn't sell it. And we said, 'Fellow, I am sorry, you bought it, you keep it.' Sears didn't buy from us for five years."

THE COURT: It would have been bad for the future, but they could have collected some of those receivables and liquidated their debts and we would all have been free.

MR. BICKS: The bank would have been free. May I continue with this, because you are starting with the same predisposition I did. It is not those agreements that caused this problem; it is really a basic ~~practice~~ ^{practice} that engendered by the structure of the toy industry and the disparate power and the nature of the power of the manufacturer vis-a-vis the large retailers. Over the years a practice emerged whereby you keep customers happy by helping them out. That is, in essence, what happened. And if someone asked, "Does anybody ever have the right to return?" The answer would be, "No."

"Are we legally obliged to take this back? No, but if we don't we will have to go out of business."

It is the basic fact that the extent over the years was the problem and there was a necessity for them. Pierce is quite candid about that.

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2 THE COURT: Why wasn't that available to Thompson?

3 MR. BICKS: They asked and they were told a lie.

4 THE COURT: They were told a lie?

5 MR. BICKS: They were asked, "What is your policy
6 on returns?" They said, "\$250 thousand for bad debt and
7 returns last year."

8 THE COURT: What was the fact?

9 MR. BICKS: There was 22 percent. That is your
10 dilution chart that Siegel initialed.

11 THE COURT: The bank didn't know it got this mis-
12 information.

13 MR. BICKS: The bank didn't know what the plaintiff
14 had been told by Topper.

15 THE COURT: Couldn't Mr. Waldman -- and you like
16 to keep away from Mr. Waldman -- you want to go to the bank
17 in general --

18 MR. BICKS: I will start with the bank.

19 THE COURT: Begin and end with Waldman. They
20 could have talked to other people if they wanted to. Could
21 Mr. Waldman not have assumed that Topper had answered every
22 question that Mr. Thompson asked him truthfully?

23 MR. BICKS: I would prefer to start with Jeffers
24 first, because I think it now is undisputed that Waldman
25 called Thompson in response to Jeffers' request. So I think

1 mnds 3

2 it is reasonable to start with Jeffers, because you say,
3 "Could Waldman have known? Is this a plausible situation?
4 Does this make sense?"

5 So you start with Jeffers, and here you have not
6 yet made a finding --

7 THE COURT: I have not made any findings anywhere.
8 I just told you what I am thinking now.

9 MR. BICKS: I would not suppose that you would
10 find it unreasonable for someone in the Pension Fund calling
11 Jeffers, their established contact, and to presume that
12 Jeffers had repeated the call to anybody at the bank?

13 THE COURT: That is perfectly reasonable.

14 MR. BICKS: So let us just see what Thompson said
15 he told Jeffers, and it is the first way to find what is
16 reasonable. This is at page 428:

17 "A I telephoned Mr. Jeffers.

18 "Q What did you say to Mr. Jeffers?

19 "A Well, I told Mr. Jeffers that we were considering
20 making an investment in Topper convertible debentures, I told
21 him that Mr. Mole had suggested that I call him, and I also
22 reminded him that I had met him earlier in the spring of
23 1971 at one of these investment meetings with the bank people,
24 jut to be sure he knew who I was.

25 // I then told him that I had been out at Topper's head-

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2 quarters and that I had questioned the company about its
3 banking relationship and with particular emphasis on the
4 accounts receivable and inventories and had been told that
5 Citibank was the lead bank in the lending group for the
6 company. And then I asked him for whatever help the bank
7 could give us in evaluating whether to make an investment
8 in Topper."

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2 THE COURT: That part I didn't see anything wrong
3 with. What I thought improbable and now found happened was
4 that Thompson had not told Jeffers what he found out.

5 MR. BICKS: That is important, the testimony
6 as to how this came about. They said, "Why don't you contact
7 the bank?" He said, "Who are the people at the bank?"

8 THE COURT: They told him Waldman. Let us not
9 argue that, because I have found that it happened just the
10 way it has been testified to. That is one finding that I have
11 committed myself to make, it happened just the way Thompson
12 described it.

13 MR. BICKS: It is not unreasonable.

14 THE COURT: Whether I thought so or not is
15 immaterial. It is what I find now, what I will find, that
16 that is exactly what Thompson told Jeffers.

17 MR. BICKS: That he was interested in the receiv-
18 ables and the inventory, and that he understood Citibank
19 was the lead bank, and there was the conversation about the
20 controls.

21 THE COURT: I didn't hear anything about controls
22 as you read it.

23 MR. BICKS: You are absolutely right.

24 THE COURT: And you've got to remember Waldman
25 specifically said he could give no such help in evaluating

1 mmds 5

2 the investment. Waldman specifically said that was not his
3 function.

4 MR. BICKS: If I may, Judge, on the issue of
5 this investment advice, because that seems to be bothering
6 us, at the root of this colloquy that this really was invest-
7 ment advice and we should have known Waldman's response indi-
8 cated that he was not intending anything he should say here
9 to be relied on in connection with making an investment --

10 THE COURT: I didn't say that. Why go that far.
11 He said he was not giving investment advice. I didn't say
12 he didn't expect people to rely on what he did say.

13 MR. BICKS: It is just the accident of diversity
14 of plaintiffs. You have before you the two extremes in the
15 range of Pension Fund management philosophies. Do you remember
16 Sol Solomon, Mr. Last's trustee?

17 THE COURT: The Pension manager was Mr. Bernstein.

18 MR. BICKS: Solomon is the exact opposite.

19 THE COURT: Solomon might be the most sophisticated
20 of all investors.

21 MR. BICKS: But he doesn't do it by himself.

22 THE COURT: That may not be lack of sophistication.

23 In my case it would show unsophistication to try
24 to do it myself.

25 MR. BICKS: I didn't mean to be facetious. If I

1 mmdg 6

2 may develop this, because this is very important, this is
3 where the history comes in, and I think this is important on
4 the first issue, and I didn't mean to demean Mr. Solomon.

5 MR. LAST: It is perfectly all right.

B2 6 THE COURT: The trustees exercised their fiduciary
7 responsibility by hiring the best man they thought they could
8 find to advise them how to invest, and the best man they
9 thought they could find was Mr. Bernstein.

10 MR. LAST: Exactly.

11 THE COURT: That doesn't mean to say that anyone
12 is unsophisticated. Bernstein apparently over the years has
13 worked out pretty well.

14 MR. BICKS: Then there is the testimony of Mr. Mole.
15 I think this is interesting in terms of not only the history
16 of how these funds came to be started and how each of them
17 came to be run differently, but also has a real bearing on
18 this investment advice. That is the way United States Steel
19 used to run its pension fund prior to 1950, with the banks
20 as trustees. And then the judgment was made that it could
21 be better run internally, relying, however, on the bank's
22 investment aid as called upon. Now, how did that relation
23 work over the years? I think Mr. Mole's testimony on that is
24 rather illuminating. I think he testified that over the
25 years he, as president of the Pension Fund, and even before,

1 nmds 7

2 when he was the senior investment employee, from 1950 through
3 1971, would regularly call his contact officer at Citibank
4 whenever he ~~thought~~ ^{thought} Citibank could be of help in connection
5 with private placements.

6 Mole testified he did not ask, "Should I do this
7 deal or shouldn't I?" Or, "What is your recommendation?"
8 That is not the way the relationship functioned. He called
9 upon the bank for key facts and judgments. You watched him
10 function as a witness, heard him testify as a witness. He did
11 not rely on Citibank for the Yea or Nay. He relied on them
12 for key judgments and facts, and that has to be taken a step
13 further in the case of the ^Pprivate ^Pplacement. Do you remember
14 his analogy that a private placement is like a tailor-made
15 suit as compared to a store-bought suit? That is very interest-
16 ing in terms of what the memorandum shows.

17 The terms of this deal were made in late August.
18 Mole was not going to rely on anybody from Citibank to make
19 the final judgment as to whether to go into this or not.

20 THE COURT: What in your concept did he want to
21 find out from Waldman?

22 MR. BICKS: It is as clear as a bell. ^g

23 THE COURT: Then you are dealing with a dense
24 judge, because it is not clear to me what Mole thought he was
25 going to get from Waldman.

1 mmds 8

2 MR. BICKS: The clearest, most concise, simplest
3 statment of the financial condition of this company, and
4 particularly, "Are they in good shape or not? Do you know of
5 any problems or don't you?"

6 Let us go back to what we agreed was undisputed
7 as to what Thompson told Jeffers he wanted. It is at page 428:

8 "A I telephoned Mr. Jeffers.

9 "Q What did you say to Mr. Jeffers?

10 "A Well, I told Mr. Jeffers that we were considering
11 making an investment in ~~Feeney~~ ^{Topper} convertible debentures, I told
12 him that Mr. Mole had suggested that I call him, and I also
13 reminded him that I had met him earlier in the spring of 1971
14 at one of these investment meetings with the bank people,
15 just to be sure he knew who I was.

16 "I then told him that I had been out at Topper's head-
17 quarters and that I had questioned the company about its
18 banking relationship and with particular emphasis on the
19 accounts receivable and inventories and had been told that
20 Citibank was the lead bank in the lending group for the
21 company. And then I asked him for whatever help the bank
22 could give us in evaluating whether to make an investment in
23 Topper."

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2 So that is what they told Jeffers they wanted.

3 Now, it is true Thompson had been told by Orenstein that Wald-
4 man was the man on the account. I also think it is true that
5 Thompson knew nothing about Waldman, except that fact, and
6 that he was an employee of Citibank. It seems to me entirely
7 reasonable that in light of the relationship of 21 years be-
8 tween the Fund and the bank, knowing Waldman, knowing he was
9 the senior man on the account and knowing his skill, expertise,
10 background, judgment, would call the man on whom they had
11 grown to rely on by virtue of experience over the years and
12 felt they had a right to rely on and say, "This is our problem.
13 Help us."

14 THE COURT: Let us then speculate on what Jeffers
15 should have told Waldman. It seems to me what I would have
16 told Waldman had I been in Jeffers' place -- and, God knows,
17 I have never been in that kind of place -- I would have called
18 Waldman and said, "Mr. Waldman, there is a fellow named
19 Thompson going to call you. I just want you to know he is
20 a friend of the bank's. Answer any questions he asks you."

21 MR. BICKS: I thought we agreed that it would have
22 been reasonable for Thompson to conclude that Jeffers would
23 have reported to Waldman what Thompson had said to Jeffers.

24 THE COURT: That is right. All right. Let me
25 amend that, "I want you to know that a fellow named Thompson

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2 is going to call you. They are thinking of investing in Topper.
3 Thompson represents United States Steel. They are real friends
4 of the bank. Answer any question he asks you."

5 That is what I think he would have told him.
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tein 2 MR. BICKS: All right. You don't think he would
3 have said he is considering a purchase of Topper debentures.

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Bl 4 THE COURT: Yes. That is what I thought he said.
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5 MR. BICKS: I am not in a position obviously to
6 speculate on what Mr. Jeffers might have said.

7 THE COURT: I think you are entitled as a matter
8 of law to the broadest possible inference of what Mr. Jeffers
9 would have said to Mr. Thompson and I certainly think -- I
10 mean Waldman -- and I certainly think you are entitled to
11 the inference that you have just suggested, that he would
12 call Mr. Waldman and tell him just what you said, that
13 Thompson represents United States Steel, they are real friends
14 of the bank. Whether he would have said they have an invest-
15 ment account, I would guess not. It's immaterial I think.
16 I don't think it's material. They are real friends of the
17 bank, he is thinking of investing in Topper, he is interested
18 in finding out about accounts receivable, tell him anything
19 he wants to know.

20 That is what I think he would have said. I think
21 that is about as much as you can infer. Do you think there
22 is anything further you can infer?

23 MR. BICKS: Tell him what he wants to know.

24 THE COURT: Tell him what he wants to know.

25 MR. BICKS: I don't mean to blur the issues here,

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2 because I think thus far we are approaching this --

3 THE COURT: I think it's very crucial, because
4 obviously if Waldman had been Thompson's financial advisor
5 he shouldn't have acted the way he did. He should have
6 tried to figure out what Thompson ought to have known and
7 told him.

8 I think in the situation Waldman couldn't reason-
9 ably be expected to do more than answer questions that were
10 asked of him.

11 MR. BICKS: Okay. I think, and I don't mean to
12 be picking up detail here, that approach highlights the
13 difference between us as to whether the responsibility at
14 issue here was one personal to Waldman or one of the bank's.

15 THE COURT: It's not personal to Waldman, but
16 Thompson knew he was talking to Waldman and it's up to
17 Thompson and Thompson certainly saw that Waldman wasn't giv-
18 ing him any advice, and if Thompson wanted advice he should
19 have called back Jeffers, if that is what he wanted. He
20 didn't want advice.

21 I think he was making a routine credit check.
22 That is what I think he was doing. I think he has blown it
23 up in retrospect to something more. That is what I commented
24 when he was on the stand. I think he was making a routine
25 credit check.

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2 If you want to know what I am thinking, I will
3 give you the benefit of it, because if you show me either now
4 or in your brief that I am not justified in thinking it I
5 want to be told.

6 Having listened to Waldman, having listened to
7 Thompson, having listened to Mole, and trying to put myself
8 in the jury's position, trying to figure out what the hell
9 happened, I think what happened is that Thompson was told by
10 Mole, "Well, touch base with the bank." He never heard of
11 Waldman. Anybody likes to talk to somebody that has heard
12 of you before.

13 Now that I am a judge I don't have to do that so
14 much. Before that if I wanted to talk to someone in your
15 firm that didn't know me and I didn't know and I wanted to
16 get a favor from him, or I wanted to get information from him
17 I would call you and I would say, "Bob, Harry Jones, is he
18 a good man?"

19 "Yes."

20 "Listen, I want to call him. Will you do me a
21 favor and tell him that I am not a zombie."

22 You go further, "Look, I will have him call you."

23 I might even have done that before I was a judge.

24 MR. BICKS: Before you were a judge I would have
25 said, "I will tell him all the appropriate lies."

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2 THE COURT: I think that is all that happened.
3 He called him and had a five-minute conversation and he was
4 thinking of doing a routine credit check so he could say he
5 touched all the bases, and that is what the memorandum indicates.

6 Then I think what happened is the bottom fell
7 out and he began to reconstruct the events, just as I would
8 have done in his position. I am not criticizing. He began
9 to reconstruct the events and put a lot more importance on
10 this call than it had at the time. That is what I think
11 happened.

12 MR. BICKS: Sir, I think we are now on the issue
13 of reliance.

14 THE COURT: It's a mixture, because what Waldman
15 was entitled to think reliance was going to be and what
16 Thompson really relied on, they are very amorphous questions
17 and difficult to isolate.

18 MR. BICKS: It's important we try though.

19 THE COURT: It is important. I agree with you.

20 MR. BICKS: The reason I began this the way I did--

21 THE COURT: I haven't got the luxury of a jury.
22 I can just say this is my result. Now you figure out how
23 I came to it.

24 MR. BICKS: I didn't mean to digress by tracing
25 the difference between these plaintiffs, but each rely on

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2 experts for different things, and you could see that watching
3 Mr. Mole testify. I don't think he was a "Tell me what to do"
4 kind of fellow.

5 THE COURT: I can't figure out what kind of
6 fellow he was, because when a man in whose judgment he has
7 obvious confidence, because he hired him as chairman of the
8 Princeton Fund, hires an investment counselor, obviously he
9 has confidence in this fellow. This fellow calls him up
10 and says he has made a trade check and he is not going to go
11 ahead with it and he doesn't even bother to find out why.
12 I can't figure out what kind of guy he is.

13 MR. BICKS: Well, that is the business.

14 THE COURT: That just absolutely astounded me.

15 MR. BICKS: I tell you, and I am not at all sure,
16 and I don't mean to digress here --

17 THE COURT: It's useful to you to flush out all
18 my subconscious thinking. Obviously I didn't think that was
19 a part of my formal thinking. Otherwise I would have told
20 you about it before lunch. But it's useful to you to know
21 my subconscious thinking to see how I have been misled maybe.

22 MR. BICKS: It occurred to me that this was
23 troubling you, that really -- and it became clear in your
24 tentative finding -- some basic question as to the competence
25 of the operation really.

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2 THE COURT: Yes. I think it was the most in-
3 competent I have ever dreamed of, of your operation.

4 MR. BICKS: That's right.

5 THE COURT: I might as well flush that out too.

6 MR. BICKS: I more than sense it now. It's rather
7 interesting. My difficulty was first figuring whether this
8 was relevant.

9 THE COURT: It may not be relevant.

10 MR. BICKS: Second, if it's relevant, is the
11 truth going to do us more harm than good.

12 THE COURT: That's another problem. That's a
13 problem the bank had to contend with.

14 MR. BICKS: And I came to the conclusion that it
15 was bothering you sufficiently so that we should put in evi-
16 dence on that and that is one of the things we put in today.

17 There was a survey done of the ten largest funds--
18 and U.S. Steel is one of the very largest -- and in each of
19 the five-year periods Mole ran it he was No.1.

20 THE COURT: All I can say is Homer nodded.

21 MR. BICKS: I am sorry. I don't understand that.

22 THE COURT: Homer nodded. That is an illustration
23 you make when a judge as great as you or as me or your father
24 makes a mistake. We say Homer nodded.

25 MR. BICKS: That was my relevance point. I thought

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2 it might be resented. I thought to bring that out might
3 put me in the position of having the one client in the world
4 that could succeed in making Citibank look good, which is why
5 I worried about it. But I don't think it is irrelevant, sir.

6 THE COURT: His history? No, I don't think it's
7 irrelevant.

8 MR. BICKS: Let me tell you why: Because Mole
9 believed, and I think this comes clear from his testimony,
10 that Thompson handled that phone check just right.

11 THE COURT: If Mole believed that --

12 MR. BICKS: All right. There is a difference
13 here, and you have seen more of this kind of case, he has
14 never seen one before, but that is his business. You can say,
15 "I don't think anybody in the business is very bright," but
16 20 years --

17 THE COURT: I will go with you. He probably be-
18 lieved that he handled it just right. But if he believed that
19 then all he was doing was making a credit check, because if
20 he thought Mole ^[sic: Thompson] was to get information out of Waldman, I don't
21 see how he could possibly have thought it was the right
22 approach.

23 I agree with you. I think Mr. Thompson did
24 precisely what he set out to do, to make a routine credit
25 check.

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2 MR. BICKS: Okay. That was my fault. That was
3 the digression.

4 THE COURT: I think subsequently he reconstructed--

5 MR. BICKS: I would like to get back to it. It
6 was a digression. I was provoked into it by what I sensed
7 was your feeling.

8 THE COURT: I am glad we flushed it out, because
9 it can't help but have influence on how I view things, and
10 if I am wrong --

11 MR. BICKS: The point is I think Mole's reaction
12 to your reaction on the stand was very interesting. I don't
13 think you approach or he approaches a fiduciary with whom he
14 has dealt with that long quite the way you do cross-examining.

15 Let's get to where we are with Waldman and Jeffers.

16 THE COURT: But he knew Waldman was a credit
17 manager. He didn't think Waldman was a fiduciary officer.

18 MR. BICKS: You are assuming, sir, that Thompson
19 called Waldman.

20 THE COURT: But whoever called Waldman, Thompson
21 knew that Waldman was the credit manager of that account.
22 He had been told that by Topper. He knew he wasn't dealing
23 with a guy who was going to take out a pipe and sit down
24 with him and discuss his problems. He knew he was dealing
25 with a credit manager and I think we have fairly good evidence

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2 in here what credit managers usually do. They have a routine
3 they go through.

4 I don't see why Thompson had any reason to be-
5 lieve that Waldman was going to do anything different, unless
6 he asked him to, and he didn't ask him.

7 MR. BICKS: Hold on. We are at the point where
8 they followed the procedure they followed for 20 years.
9 They called the contact man. He told the contract man, "What-
10 ever help the bank could give us in evaluating whether to
11 make an investment in Topper," and referred to inventories
12 and receivables, and he told him he had been out at the ~~bank~~ ^{company}
13 and told him he was interested.

14 Waldman calls back. You say he is a credit man.
15 That's one adjective. He also happens to be the vice-president
16 in charge of the Commercial Finance Division of Citibank.

17 THE COURT: That's a very fancy title for a factor.

18 MR. BICKS: Leaving aside whether the title is
19 fancy, he is a factor.

20 THE COURT: As the experts said, they didn't act
21 any differently after they got to be bankers than they used
22 to act, and I assume Thompson knew that.

23 MR. BICKS: Here we do have something of a diffi-
24 culty of separating out four years of hindsight, almost
25 three years of trial.

2 THE COURT: That is the difficulty we had through-
3 out.

4 MR. BICKS: I thought we agreed Thompson never
5 met Waldman.

6 THE COURT: But Thompson I assume knew what factors
7 are. Contrary to the evidence before me, I assume he had
8 some sophistication. I assume that he knew what I didn't
9 know when this trial started, because I am not in that field,
10 I assume he knew that all the major banks had acquired factor-
11 ing companies and that these factoring companies were now
12 operating as branches or, rather, departments of the major
13 banks, and that they got real fancy hats, but they weren't
14 acting any differently than they were acting when they were
15 factoring companies.

16 I assume he knew that. I found it out in the
17 course of this trial, but I assume that anybody running a
18 \$3 billion outfit would know that. I mean a \$3 billion
19 credit outfit. Maybe I am wrong in that assumption.

20 MR. BICKS: You mean pension fund, don't you?

B3 21 THE COURT: The Pension Fund is a \$3 billion out-
22 fit. Investment outfit is what I meant to say. I am sorry.

23 MR. BICKS: I thought we were back behind ground
24 zero.

25 THE COURT: He was running a \$3 billion investment

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2 outfit and I would assume that he knew kind of like bread and
3 butter what I found out on this trial, the structure of these
4 things.

5 I used to think if you represented the First
6 National City Bank that meant you were a banker, but apparently
7 not, you are a factor with a fancy hat.

8 MR. BICKS: I was trying to stay away from
9 speculating.

10 THE COURT: We can't stay away from that. We
11 have to focus on what Thompson justifiably believed Waldman
12 would tell him, and we can't focus on that without an under-
13 standing of what he justifiably expected Waldman was.

14 MR. BICKS: Can we start with what Waldman said
15 he told him, or is that not reasonable?

16 THE COURT: What Waldman said he told him I would
17 say is a very good start. I don't recollect that there is
18 any difference between what Thompson said Waldman told him
19 and what Waldman said Waldman told him.

20 MR. BICKS: Sir, that is my point.

21 THE COURT: Is there a difference?

22 MR. BICKS: No, but let's start with the agreement
23 on what was told him. We began with "I want whatever help
24 the bank can give me and I am interested in inventories and
25 receivables," and we have a contemporaneous memorandum, for

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2 better or ~~worse~~ ^{worse.} Whatever you may now feel about motives
3 after the balloon went up or after the difficulty surfaced,
4 that appears to be a contemporaneous memo.

5 THE COURT: All right.

6 MR. BICKS: Remember we took Waldman through what
7 he said and what the setting of the conversation was. He
8 said, "I knew Thompson was with the Pension fund," and
9 obviously he did.

10 THE COURT: That's right, and he knew that
11 Thompson was going to invest money because Thompson told him.

12 MR. BICKS: Right.

13 THE COURT: He said Jeffers hadn't told him. Can
14 I reject that just because I think it more probable than not
15 that Jeffers did tell him?

16 MR. BICKS: Let me just say what he said. We
17 don't have to speculate. Here is the question:

18 "Q Thompson indicated he represented the Pension
19 Fund, he indicated the Pension Fund was considering purchase
20 of the Topper debentures, which debenture issue you were
21 aware of beforehand, referred to a relationship on the part
22 of U.S. Steel with the bank and let you to believe that he
23 wanted all information necessary from you, is that fair?

24 "A Yes."

25 THE COURT: All right.

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MR. BICKS: We then go to Thompson's memo.

THE COURT: But I still think all he had to do was answer questions. I think he is entitled to assume that his questioner knows what he wants to ask and can ask him.

MR. BICKS: Here is where we do have to make an assumption, not anything that broad, because Waldman said he didn't remember what Jeffers told him. I think that is what he said.

THE COURT: Yes. I don't remember what he said.

MR. BICKS: He didn't remember. He said --

THE COURT: Let's assume Jeffers had told him exactly what Waldman ^[sic: Thompson] told him ^[i.e., Jeffers]. I think you are entitled to that assumption.

MR. BICKS: It's not unrealistic. The deposition testimony shows that not only was Topper the largest account in the Commercial Finance Division, but the U.S. Steel complex was the largest account in Jeffers' operation.

THE COURT: He knew that this fellow was a friend of the bank. That is clear.

MR. BICKS: And also --

THE COURT: Using friend of the bank in banker's terms. That is not a friendly guy. That's a guy that has a lot of money.

MR. BICKS: The point is I don't think indulging

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the assumption that Jeffers told Waldman what Thompson told him is entirely unrealistic.

THE COURT: I agree with that. Furthermore, I think you are entitled to it as a matter of law.

MR. BICKS: So you start with Waldman knowing all the information necessary, which he said he knew Thompson wanted, including inventory and receivables. What is the first paragraph in Thompson's memo? Doesn't he talk about the audits performed by the bank? Or is that the second paragraph?

THE COURT: It's in there somewhere. I can't find it.

MR. BICKS: We have since seen these audit reports. We went through March, May, August, and the one right after the Pprivate Pplacement. Remember we went through each of them, the one right after saying, "Gosh, we are glad our loan is down"?

THE COURT: The auditor said that. Mr. Siegel said that he wasn't glad.

I wonder now whether Mr. Siegel was remembering correctly in view of what the fellow who just left --

MR. DAILEY: Skaar.

MR. BICKS: Okay. From that memo would you, in light of the background, would you say that Thompson asked about the state of receivables, fairly?

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2 THE COURT: And he would have told him he was
3 satisfied with them, which is what he was.

4 MR. BICKS: Now, sir, I would say, knowing these
5 facts, no reasonable investor could truthfully have responded
6 that way.

7 THE COURT: All right.

8 MR. BICKS: That is the reasonable man test. That
9 is a straight issue of law, a straight issue of law.

10 Look at Waldman's response, because it highlights
11 the difference between the secured and unsecured creditor.
12 These are not only 30 percent of the total gross receivables,
13 the \$9 million 60 days past due, but they are on the principal
14 product of the company.

15 THE COURT: Obviously your question of law turns
16 right on this answer, the relationship between FNCB -- in-
17 cidentally, they changed their name?

18 MR. WOLLEN: It's now called Citibank, your Honor.

19 THE COURT: No more First National City Bank?

20 MR. BICKS: Yes.

21 THE COURT: That is a legal change of name?

22 MR. BICKS: Yes.

23 THE COURT: That is immaterial.

24 "The relationship between FNCB and Topper has
25 been good and there are no problems at the moment, nor does

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2 Mr. Waldman anticipate any."

3 My present impression is that Waldman, whatever
4 we may think of his views with 20-20 hindsight, was express-
5 ing his honest views at that time, and that, of course, is
6 confirmed by your last witness, who said that Siegel told
7 him he had doubts, but they weren't shared by his associates.

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8 Your legal question, and right here it zeroes
9 in, in view of Waldman's knowledge that this money was going
10 to go into the bank, did he have an obligation to say, "Now
11 wait a minute, this is my view, but I am not an investment
12 man, as I am going to tell you in a minute now, when you ask
13 me, I am not an investment man, and what you ought to do is
14 check with someone else who will look at it from a different
15 point of view, because there are all kinds of facts that I
16 know that you ought to ask about?"

[i.e., Thompson]

17 MR. BICKS: I will tell you what he had a right
18 to assume. It wasn't anything like that at all. He had a
19 right to assume Jeffers had done that before he ever talked
20 to Waldman.

21 THE COURT: Why did he have any such right? He
22 knew that Jeffers didn't know anything about the Topper
23 account. That we all agree.

24 MR. BICKS: Why did he have a right to assume,
25 sir? Let's start with that.

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2 THE COURT: Why did he have a right to assume
3 that Jeffers told him anything about the Topper?

4 MR. BICKS: He was told that Jeffers knew nothing
5 about Topper at the time, but Jeffers was the man responsible.

6 We go back to Mole's testimony as to how this
7 worked, and this is undisputed.

8 THE COURT: We can spend as much time as we want
9 to on this because this is your whole case, and so we ought
10 to flush it out, for two reasons. In the first place, to
11 try to persuade me, in the second place, to make it perfectly
12 clear to the Court of Appeals that you gave me every chance
13 to be right.

14 MR. BICKS: Without repeating the difference be-
15 tween the various funds, the fact is they paid these fellows
16 a heck of a lot of money over the years for services that
17 included other than investment advice. There is no dispute
18 as to that.

19 THE COURT: No dispute about that.

20 MR. BICKS: But also included something called
21 "investment advice". We agree on that.

22 THE COURT: That's right.

23 MR. BICKS: It is hard to qualify how much was
24 for what. We do know that the Fund looked to Citibank for
25 both and that on Citibank's books they allocated 25 percent

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2 of the fees to something called "investment advice". That is
3 pretty much undisputed.

4 We also know that Mole wasn't paying Citibank
5 to recommend investments. He was paying so that he could
6 go to them and get the answer from the best person available
7 to the question he wanted to know.

8 THE COURT: Then why did he tell Thompson he had
9 no business asking Waldman whether he should make an invest-
10 ment or not?

11 MR. BICKS: Because Waldman didn't know the
12 details as far as Mole knew, the precise relation between
13 Mole's negotiations and Topper's on the terms of the note.

14 THE COURT: He was trying --

15 MR. BICKS: He was looking for information and
16 financial judgment regarding Topper.

17 THE COURT: I know, but there are ways of getting
18 information. If Thompson were just doing what I think he
19 was doing, making a routine credit check, and merely wanted
20 the ~~courtesy~~^{courtesy} of someone that knew him to talk to, then what
21 he did was perfectly correct. He just asked him these routine
22 questions, got the routine answers, and hung up.

23 If he wanted financial information in the sense
24 on which to base advice and he got this answer --

25 MR. BICKS: No problems.

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THE COURT: -- he got this answer, as he put it, he would not commit himself, as he testified -- he was stronger than would not commit himself, as he testified; he said it was none of his goddamned business -- it seems to me he would have said, "I know it's none of your goddamned business, but what do you know that I don't know that would be helpful," or at least something to get the guy to talk.

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MR. BICKS: Your Honor, we agreed we would not characterize this one way or the other, but just get to the facts and not get into characterizations.

5

THE COURT: All right, I will subside.

6

MR. BICKS: I don't want you to subside.

7

THE COURT: You are in a difficult position. In the first place, you want to find out what I am thinking, and, in the second place, you want to have a chance to say what you are thinking.

11

MR. BICKS: The only relevance of what I have to say is to what you are thinking.

12

13

THE COURT: Still, you can't persuade me unless I let you say it.

14

15

MR. BICKS: That may not be true. I do think it might be best to go through the undisputed facts with regard to the conversation, since we admitted the problems, we admitted Citibank knew all about them.

16

17

18

19

THE COURT: Citibank didn't know the problems; you still have not persuaded me that all this was irrelevant.

20

21

MR. BICKS: I didn't say it was irrelevant. I don't think it was the principal cause.

22

23

THE COURT: It had relevance?

24

MR. BICKS: Yes. It is perfectly understandable.

25

After we began, we started to realize that these things didn't

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2 make any difference. But Thompson called and said, "We
3 want whatever help you can give us in evaluating whether or
4 not to make an investment in Tonper."

5 And then we have Waldman's response. He knew
6 we wanted all the things necessary to make the decision.
7 We have Thompson's memorandum before you. I won't character-
8 ize that. It was very significant yesterday. Do you remember
9 Mr. Lillie taking Waldman through what I guess was paragraph
10 by paragraph of the Thompson memo? And then you leaned over
11 and asked, "Did you ever say anything about there being no
12 problems in Tonper?"

13 THE COURT: I don't know why neither one of
14 you asked him about that. It puzzled me.

15 MR. BICKS: Mr. Lillie did.

16 THE COURT: After I had.

17 MR. BICKS: He asked him on direct and he said
18 there were no problems. That is very important.

19 THE COURT: I don't think he did.

20 MR. BICKS: Yes, he did. Then you asked him the
21 question. Let me read that to you:

22 "THE COURT: There is a statement in Thompson's
23 memorandum about his conversation with you, which neither
24 counsel seem to have referred to, which says that you foresaw
25 no problems. Do you remember saying something like that?

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2 "THE WITNESS: I don't recall exactly, but I
3 believe there was some question about a problem. I said there
4 were no problems."

5 That is the flattest statement from Waldman as
6 to what he said.

7 THE COURT: That is right, and he said it, and
8 he testified that as far as he was concerned he didn't think
9 there were any problems.

10 MR. BICKS: If we are agreed on those facts, then
11 this is a strict issue of law.

12 THE COURT: We have to agree on those facts.
13 There is no dispute.

14 MR. WOLLEN: The only qualification of that is
15 that Mr. Lillie then asked Mr. Waldman on redirect --

16 THE COURT: I don't care who asked who what.

17 MR. WOLLEN: He asked whether that question was
18 in the context that Mr. Thompson wrote in his memorandum,
19 and Mr. Waldman said, yes, that was the context in which he
20 said there was no problem.

21 THE COURT: Yes, that is right.

22 MR. BICKS: So we have a straight issue of law
23 here under 10b-5, what a reasonable man in light of this
24 relationship would have said or done.

25 THE COURT: But you can't talk about what Citibank

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2 as an institution would have done.. You have got to talk
3 about what Mr. Waldman in his position should have done,
4 and what Thompson reasonably would expect him to have done
5 in this context.

6 MR. BICKS: I don't think we are apart. If you
7 will accept this one modification, let us talk about what
8 Citibank did through the person of Waldman.

9 THE COURT: That is another way of saying the
10 same thing.

11 MR. BICKS: Because Citibank picked Waldman.

12 THE COURT: But it is not established that they
13 picked him with any invidious purpose. If I wanted to dream
14 up something that Jeffers would have testified which would
15 have been harmful, which I must say I have dreamed up, but
16 I don't think I could find it because there is no basis for
17 it. after Thompson talked with Jeffers, Jeffers called
18 Siegel and said, "I want you to call Thompson," and Siegel
19 said, "Oh, my God, don't have me call him, have Waldman call
20 him," now, if that had happened, you would have a good case.

21 MR. BICKS: We are not asking you to surmise that.

22 THE COURT: You've got to remember, Citibank
23 picked Waldman, but it picked the person who, as Thompson knew,
24 was the manager of the factoring accounts.

25 MR. BICKS: Also vice-president in charge of

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2 commercial finance.

3 MR. BICKS: But we did not know that until a few
4 days ago.

5 THE COURT: But if I was manager of a 3 billion-
6 dollar fund, I would have known it. Thompson was the manager
7 of a 3 billion-dollar fund and had been in the business for
8 I don't know how long, and he is attributable with knowing
9 how banks work and how factoring companies work. I didn't
10 know that fact.

11 MR. BICKS: I didn't, either.

12 THE COURT: Well, you have not been managing a
13 3 billion fund either.

14 MR. BICKS: That is true.

15 THE COURT: That is not really in point, but the
16 great asset of being a lawyer is you forget what you learned
17 quickly.

18 MR. BICKS: Again, I would prefer to talk about
19 the testimony, rather than what people knew.

20 THE COURT: You can't disassociate it from what
21 people knew or what Thompson must be assumed Waldman to have
22 known or thought. If you are making a 3 million-dollar invest-
23 ment, and you have spent, I don't know, how many hours -- it
24 is in the record --

25 MR. BICKS: A lot --

1 mmds: 6

2 THE COURT: And you want to find out everything
3 Citibank knows, would you do it in a 15-minute telephone
4 conversation?

B2 5 MR. BICKS: It is sometimes done and there were
6 no problems with Topper.

7 THE COURT: Yes.

8 MR. BICKS: There is no question in my mind that
9 Topper was on its back.

10 THE COURT: That is as clear as the nose on your
11 face now with 20-20 hindsight.

12 MR. BICKS: I am not so sure it was not clear
13 then. Let's start with saying any reasonable man would know
14 it is clear. We establish Citibank knew those facts, if
15 not Edward Waldman.

16 THE COURT: You can hold them liable through
17 the actions of their officers or agents.

18 MR. BICKS: We have established the Pension Fund
19 goes to its contact man, it says, "We are contemplating an
20 investment in Topper. We understand Citibank is the lead
21 bank. Give us whatever help you can."

22 Waldman, in response to a request from Jeffers
23 calls Thompson, is asked, "Are there any problems?" And
24 Waldman says, "There are no problems."

25 That is our case and those are undisputed facts.

1 muds: 7

2 It is a straight issue of law. If after 20 years of a rela-
3 tionship they pick a man and in his capacity, he knowing
4 you are going to make an unsecured investment in debentures
5 behind him, and he says, "No problems," that is it.

6 THE COURT: That is the strongest statement of
7 your position.

8 MR. BICKS: But I think it is based on facts.
9 This is a simple, straight 10b-5 garden variety case.

10 Now, there was more than just a conversation here.
11 You asked Mr. Last, you remember, when I was presumptive
12 enough to stand up, I was going to respond to the question
13 you asked him, what Citibank should have done, whether it
14 told the truth --

15 THE COURT: Well, I found that Waldman told the
16 truth. I did not find that, but that is my present view.

17 MR. BICKS: Do you think a reasonable man knowing
18 these facts could have said, "No problem at Topper"? That
19 is our case. I am not really concerned with what Waldman
20 really knew. That is between himself and his Maker.

21 THE COURT: Unfortunately, I've got to intervene
22 in that relationship.

23 MR. BICKS: This is not a criminal trial.

24 THE COURT: Criminal or civil, I've got to find
25 out what the man thought and said and whether it is relevant.

1 made

2 MR. BICKS: We can agree with what he said. What
3 facts he had, what a reasonable man knowing those facts is
4 relevant.

5 There is another area of undisputed facts which
6 really goes to understanding the background of this conversa-
7 tion. This whole area of undisputed facts on Topper plus
8 Citibank's knowledge of them we can put on the shelf. That is
9 proved. There is another area, and that is Citibank's role
10 in connection with this financing. What did Waldman testify
11 as to that and what do his contemporaneous writings show,
12 which I would rely on more than his testimony. I think just
13 generally it is a sound basis to go on. What was the guy
14 saying in writing at the time. Do you remember his June 20
15 memo on his conversation with Orenstein, where he says,
16 "Orenstein told me he has got this debenture money lined up;
17 he is in a cash bind; he needs a 2 million over-advance,
18 and I agreed to give it to him providing" --

19 THE COURT: That is Mr. Last's point, that if
20 Waldman never had this conversation, you still have a case.

21 MR. BICKS: Yes, and the surrounding undisputed
22 events lend a lot of meaning. Do you remember Waldman on
23 the stand yesterday was asked by me, "Was it a condition to
24 your granting that first over-advance of ~~2~~ 2 million that
25 Orenstein effect that private placement and turn over the

1 mnds 9

2 proceeds to you?" And he said, "Yes."

3 That is it. He is giving him 2 million dollars
4 on condition that he go out and bring in ~~5~~ million and turn
5 it over to Waldman. Now, that is Waldman's thinking as of
6 January 21. He is thinking ~~2~~ million. And here is where
7 it gets pretty dramatic. He is thinking ~~2~~ million. Bear
8 in mind back in February he signed an authorization saying
9 maximum over-advance this month of ~~500~~ thousand. That is
10 very relevant. He said, "None of us thought these toys would
11 sell in May or August. That is not the regular selling
12 season."

13 What the hell was he doing back in February when
14 he said "maximum over-advance 500 thousand." Then he gets
15 to June, ~~2~~ million. Okay. That is only four times what he
16 expected, "But I will give you the money on condition you go
17 out and get money from these people." July is even worse,
18 three weeks later, "Not ~~2~~ million, we need ~~3~~ million."

19 "Is our deal still good?"

20 "Yes, will you agree and will you write that in?"

21 Waldman says, "Yes."

22 We have gone from ~~500~~ thousand in February to
23 ~~2~~ million on June 21, to ~~3~~ million three weeks later. That
24 isn't enough. Four weeks later he raises it to ~~4~~ million ^{\$4.8},
25 and that is still not enough. The day after the Thompson

1 ends 10

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2 conversation, one day later, he is up to ~~4~~5 million. And
3 that is the man that says, "No problems."

B3 4 THE COURT: Well, you are talking on Mr. Last's
5 point.

6 MR. BICKS: Yes, but it is very relevant to what
7 went on in the conversation, what the people were thinking.
8 Here is Thompson sitting there, there is that 20-year rela-
9 tion, "I told Jeffers what I wanted." Waldman admits he knows
10 all the relevant information and he told him "No problems."
11 You have Waldman making this deal with Orenstein to keep him
12 afloat until he got the ~~P~~ Private ~~P~~ Placement proceeds.

13 THE COURT: It is relevant to Waldman's credibility,
14 but it seems more relevant to Mr. Last's point, which is a
15 point that I did not take into account in my discussion this
16 morning, namely, the bank having told Tonner, in effect,
17 "You've got to make this \$3 million or we are going to fore-
18 close on you," that the bank at that time had an affirmative
19 duty to ascertain whether or not Tonner committed any fraud
20 in connection with getting that. Now, that is the point.

21 MR. BICKS: Did you see the suggestion in Judge
22 Friendly's opinion that came down Monday on that very issue?

23 THE COURT: I will have to take the Fifth on that.

24 MR. BICKS: I will give it to you. It is very
25 interesting, on the right to remain silent.

1 mmds 11

2 THE COURT: This is more than the right to remain
3 silent.

4 MR. BICKS: That is exactly right. He didn't
5 say, "No comment."

6 THE COURT: I am not denying that it has a bear-
7 ing on credibility, which might cause me to reconsider my
8 finding, but Mr. Last's expression of it, I think, makes for
9 clarity of thinking, and I don't remember the exact testimony,
10 but at the point where Orenstein or Rose came to Waldman and
11 said, "We need \$3 million to get us over the summer," and
12 Waldman says, "Not from me you don't get it" -- these are
13 not his words -- "Not from me you don't get it, you get it
14 from some private placement."

15 And Orenstein says, "Okay, I will."

16 At that point the bank had an affirmative duty
17 to see to it that Orenstein did not defraud anybody in the
18 course of getting that \$3 million.

19 MR. BICKS: At that point -- may I get your
20 question -- you want to carry it through and assume the
21 **P** **P** private placement went through?

22 THE COURT: Yes.

23 MR. BICKS: But at that point you assumed it went
24 through, because at that point Tonner didn't do anything.
25 Assuming it went through without a conversation?

1 runs: 12

2 THE COURT: Without a conversation. I am not
3 saying that this is irrelevant to the question of whether
4 I should have believed Waldman, and I have said temporarily
5 I do believe him. I am not oblivious to these arguments that
6 you have made which suggest that maybe I was in error in say-
7 ing I believe him, but we skip all that. Mr. Last's point
8 is that the minute -- I hope he has not a copyright on it --

9 MR. LAST: No, it is all right.

10 THE COURT: Mr. Last's opinion is the minute
11 Waldman said to Orenstein or Ross, "Not from me you don't
12 get it: you go out and get it from somewhere else," knowing
13 that Citibank had started Topper on this course, did it have
14 some obligation to the public to see to it that Topper did
15 not defraud anybody in the course of getting the money which
16 Citibank knew Topper was going to deliver to it when they
17 got it.

18 MR. BICKS: Did Citibank give Topper an advance
19 on that?

20 THE COURT: Yes.

21 MR. BICKS: Because that is important. They kept
22 them afloat.

23 THE COURT: It is certainly something.

24 MR. BICKS: That is an issue we have not addressed
25 ourselves to by way of proof, because I believed we would

1 mmds: 11

2 focus, assuming there was no conversation, we would have to
3 address ourselves to what to me was an interesting but
4 completely irrelevant question, if Citibank pulled the string
5 then would they have been worse off? We would have to show
6 motive.

7 THE COURT: No, you don't have to show any motive.
8 Mr. Last doesn't say that Citibank had a motive. Mr. Last's
9 point is motive or no motive, Citibank said, for good, bad
10 or indifferent reasons, "I am not going to lend you any more
11 money. If you want more money, you get it from Bob Bicks."

12 MR. BICKS: Can I say what I mean by motive?
13 Motive in the same manner as an inside information case,
14 that as you have it now, what you are postulating now is an
15 exact counterpart to the Second Circuit decision in Shapiro
16 as regards to three defendants at Merrill, Lynch. Do you
17 remember the Shapiro case?

18 THE COURT: Not by name.

19 MR. BICKS: That was in regards to McDonnell-
20 Douglas, the inside information, where Merrill, Lynch was
21 doing an underwriting and it came across information in the
22 course of the underwriting.

23 THE COURT: It seems to be coming back to me.

24 MR. BICKS: That was a situation where one-month's
25 earnings seriously affect the five months' earnings, and one

1 name: 14

2 partner told another partner who told a couple of big, favored
3 customer^S_A who sold.

B4 4 A class suit was brought by every purchaser of
5 McDonnell-Douglas, and there was liability found on the part
6 of the Merrill, Lynch partner who never sold for his own
7 account, never told any customer of his, not only to every-
8 body who was told by the tipster, but to everybody because it
9 affected the market.

10 Citibank is the tipster in this situation.

11 THE COURT: You can't say Citibank is a tipster.

12 MR. BICKS: They were, in effect, the seller.

13 Topper, before the transaction, had a secured loan. After
14 the transaction it had the same debt on an unsecured basis,
15 plus conversion. Citibank, in effect, sold a portion of
16 its loan on a non-secured basis to these plaintiffs.

17 MR. LAST: To us.

18 MR. BICKS: That is what they did. They were
19 really the tipster sitting with inside information.

20 THE COURT: Tipster seems to confuse the issue. They
21 were the seller, according to what you are saying?

22 MR. BICKS: Yes.

1 jhbr 1

pm

2 THE COURT: This presents to me a very
3 interesting question. Let me tell you what, I think the
4 relevant facts are.

5 The question as I see it is as follows:
6 In view of the fact that Topper was in the position
7 that if it wanted credit it had to go either to Citibank
8 or to somebody acceptable to Citibank because of Citibank's
9 relationship with Topper, they couldn't go out and borrow
10 money from anybody as a practical matter without --

11 MR. BICKS: You are absolutely right, sir.
12 The reason for that is very important to your analysis.
13 If they were going to borrow on a secured basis, as you
14 pointed out in your question, they needed an amendment to
15 the finance agreement. They also knew even if they
16 were going to borrow on an unsecured basis they had to
17 rely on the fact that if anybody went to Citibank they
18 wouldn't reveal these facts.

19 THE COURT: I don't find that.

20 MR. BICKS: As a practical matter that had
21 to be the situation.

22 THE COURT: You can argue that. In any event,
23 as a practical matter, they had to get Citibank's approval
24 if for no other reason than that Citibank could close them
25 down.

1 jhbr 2

2 MR. BICKS: Okay.

3 THE COURT: So at the point where Citibank
4 through Waldman told Jack Rose and Orenstein "You need
5 \$3 million, I will give it to you for three months, on
6 condition you get it from somebody else to give it back to
7 me," at that point the question is was Citibank under
8 an affirmative duty to see that Topper didn't defraud any-
9 body in the course of getting that \$3 million.

10 Now, my tentative findings of relevant facts
11 would be (a) that Topper did in fact defraud you people in
12 the process of getting that money, (b) that Citibank had
13 no knowledge that Topper was defrauding you people in the
14 process of getting that money, but that its a serious question
15 -- well, another fact, that they took no particular steps to
16 advise themselves one way or another as to whether --

17 MR. BICKS: Also they got twice as much back.
18 Your set of facts is "We gave you three, we get back three."
19 They gave them three and they got back 5-1/4.

20 THE COURT: It makes it more juicy, but I don't
21 think it makes any difference in the legal theory.

22 My finding would be that they took no particular
23 steps one way or ~~another~~ ^{another} to find out whether Topper was
24 defrauding anybody and it's an open question, about which
25 I am not even prepared to make a tentative finding because

1 jhbr 3

2 I hadn't thought of it, thought of this phase of the
3 case, whether or not Citibank was in such a situation that
4 it was not reasonable for them not to know that Topper would
5 probably engage in fraud in order to get this.

6 MR.BICKS: On that point, you see, that is
7 where the two issues merge. Your last point merges this
8 back to where we have been really and puts it together
9 because a good part of -- leaving aside the ^Prospectus,
10 which to me is important but to you isn't --

11 THE COURT: It's very important if you prove that
12 the bank knew about the ^Prospectus. Under my present
13 theory the question is should they have known about it --

14 MR. BICKS: Leaving that question aside,
15 sir, I think that leaving aside the posture of a secured
16 lender, you know, which is what Mr. Silverman was testifying
17 about, that Citibank had to know, knowing the facts it did
18 about Topper, particularly as June, July and August wore
19 on, that to sell an unsecured security in Topper you
20 couldn't let these facts come out.

21 THE COURT: You know more about the case than
22 I do. I ^{am} not persuaded of that.

23 MR.BICKS: That the principal product, sir,
24 that two-thirds of it hadn't sold?

25 THE COURT: Two-thirds of it hadn't sold, but

1 jhbr 4

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2 it wasn't supposed to sell until Christmas. Topper, as I
3 gather, was trying a gimmick which didn't work. They
4 tried a gimmick to rush the season and it didn't work.

5 Don't argue this point now because you can
6 marshal the evidence. My impression is that there is
7 no necessary evidence which would make it necessary for the
8 bank or anyone else to conclude that it still wasn't a
9 good speculation, and it probably would work, that they
10 would sell them at Christmas time.

11 I say don't argue this in detail now because
12 it's not that central, but this is just to give you my
13 misinformation or information. My recollection of the
14 evidence, and again, I wasn't focusing on this when the
15 evidence was coming in, my recollection of the evidence is
16 that in essence -- at first when I saw these figures
17 I thought what Topper was up to was some sort of a fraud
18 to build up its 1970 profit and loss statement by putting
19 sales in 1970 which weren't there. I don't know if that
20 is true or not.

21 MR. BICKS: Part of it.

22 THE COURT: But there is no evidence that
23 I am aware of to support that inference.

24 Finally, the impression -- again, I am not
25 making findings, I am just trying to tell you how I think

1 jhbr 5

2 so you can correct me -- in ^{the}~~the~~ first place, I don't think
3 Topper committed a fraud in the sense that they thought
4 they were getting money from somebody which that somebody
5 wasn't going to get back. I think this fellow Orenstein,
6 whom I dearly would love to have met --

7 MR. BICKS: You say that only because you
8 haven't, sir.

9 THE COURT: -- was quite convinced that he was
10 going to pull this off and that come January there would
11 be a tremendous champagne party at which everybody would
12 participate.

13 Of course, that doesn't mean that Orenstein
14 is entitled to keep the relevant facts from everybody
15 else just because he thinks it's better for them not to
16 know.

17 Anyway, that is the background. With that
18 background, looking at it from the bank's point of view,
19 Orenstein was engaged in a perfectly legitimate effort
20 to rush the season and he thought that by getting these
21 dolls available to the customers and the ultimate retailers
22 early in the season, because they were such low rates,
23 all that kind of stuff, he would tend to change this
24 cyclical business into a less cyclical business and the
25 customers would buy these dolls.

1 jhbr 6

2 Now, that quite clearly didn't work and by
3 June it was quite clear it was not going to work. However,
4 I think what the bank thought was that although that
5 particular gismo wouldn't work, the counts were still good
6 because they would be sold in the Christmas season,
7 when they should have been sold in the first place.

8 That is what I think they thought. Whether
9 they were reasonable in thinking that or whether they
10 thought that at all, you can argue, but don't argue it
11 now.

12 MR.BICKS: I don't have to spend much time on
13 it. It's very simple.

14 First, without those sales at the end of the
15 year Topper would have shown a \$5.5 million loss and
16 would have been under then, 1970.

17 THE COURT: Would have been what?

18 MR.BICKS: Would have shown a \$5.5 loss for
19 1970 without those boats leaving Hong Kong harbor on the
20 last day of the year, which is what those sales were.
21 So it was damned important to 1970. You are absolutely
22 right.

23 Second, what were the plaintiffs told about that
24 in the **P** Private **P** Placement **M** Memorandum? It's going great,
25 the customers have reordered and our first quarter

1 jhbr 7

2 results show it and we are going to have another program
3 next year.

4 THE COURT: But what did the bank think?

5 MR. BICKS: Let's get to that. Third fact,
6 undisputed. Hieronymus, the fellow from Connecticut
7 Mutual, you remember, taciturn --

8 THE COURT: I remember him.

9 MR. BICKS: He went to Rose in front of
10 Inglis the day after the final receivables were due,
11 August 11th. He said, "Have they been paid?"

12 Rose said, "Substantially all."

13 THE COURT: No question in my mind that Rose
14 and Orenstein pulled a hornswoggle and defrauded these
15 people. When I say I don't think they intended to
16 defraud them, that is irrelevant, because you are not
17 entitled to take other people's money on the theory that
18 you know better than they do what is good for them to
19 know.

20 MR. BICKS: This will just take a moment,
21 these five facts.

22 Third, Thompson said "Is Dawn moving at retail,"
23 and was told "We checked with the customers and it is."

24 Fourth, what did Citibank know? Not only
25 that it wasn't moving, but more important, two-thirds of the

1 jhbr 3

2 whole 1970 product was Dawn, 60 percent of the '71 product
3 was Dawn. If they were going to sell what they had already
4 sold in '70 at Christmas what in hell were they going to do
5 ^{with} the '71 product that was shipped on their shelves?

6 THE COURT: Okay.

7 MR. BICKS: Practically, that doesn't stand
8 up. That is why I asked "Did you know" -- first on
9 with Waldman -- "Substantially all of the ~~S~~ Spring ~~P~~ Program
10 was Dawn and that it was the principal product line for
11 '71?" He said "Yes."

12 If they were saving the ~~\$14~~ ^{\$14} million that were
13 sold in '70 to be sold Christmas '71, what was going to happen
14 to the ~~\$45~~ ^{\$45} million that was reported as sold all during the
15 year?

16 If you really just want to conjure with this,
17 bearing in mind that these damned dolls sold for ~~\$2~~ ^{\$2} million
18 -- we did this just as a matter of humor -- every young
19 lady under 11 years old in the United States would have had
20 to buy 6 Dawn dolls for Christmas. That is the way they
21 come out. That's sheer absurdity.

22 THE COURT: Those facts aren't analyzed before
23 me, but I assume they are in the record.

24 MR. BICKS: Yes. Very simply, that is
25 it on that point.

1 jhbr 9

2 So we come back here to your three issues
3 and mine. I say what Waldman would have said to his
4 superior with regard to the secured financing doesn't
5 have anything to do with ~~any~~^{OUR} case. I mean, I don't happen
6 to believe Waldman would have said that to his superior.

7 THE COURT: That is not your function.

8 MR. BICKS: That is interesting, but not
9 very relevant, for the reasons -- I don't mean that to
10 be --

11 THE COURT: I understand.

12 MR. BICKS: We have been through it. Your first
13 point on investment advice, I would ask that you resist to
14 the last moment the desire to characterize and just stick
15 to what the undisputed testimony is, what Thompson said to
16 Jeffers, what Waldman knew and what Waldman said he said
17 to Thompson in light of what Waldman knew.

18 I mean, it's easy to say put it in that
19 pigeon hole or that pigeon hole. But ~~we~~^{we've} got what Thompson
20 said and we got what Waldman said he said.

21 THE COURT: They agreed.

22 MR. BICKS: Okay. In light of that, I think
23 your 10b-5 -- that's the way I end, particularly in a
24 context where you are dealing with the fellow who got all
25 the money as a cushion beneath his loan and kept the

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2 company afloat, indeed, gave them the over-advances that
3 were required to keep them afloat.

4 THE COURT: Okay.

5 You want to say a few words?

6 MR. WOLLEN: Yes.

7 THE COURT: If you do, we will take a short
8 recess.

9 MR. WOLLEN: I have just 30 seconds worth.

10 THE COURT: Is that all? We won't take a
11 short recess.

12 MR. WOLLEN: First, just to clarify your
13 Honor's understanding, and I don't say this in an attempt
14 to change your Honor's mind with respect to your Honor's
15 conclusion on this point at this time, but there is evidence
16 in the record that Mr. Jeffers just does not remember the
17 telephone conversation.

18 THE COURT: How did that get in the record?

19 MR. WOLLEN: In an answer to interrogatories
20 we admitted that Mr. Jeffers doesn't remember the conver-
21 sation. He so testified before the SEC. He just has no
22 recollection.

23 THE COURT: There is an answer to an interro-
24 gatory?

25 MR. WOLLEN: Yes.

1 jhbr 11

2 THE COURT: An admission by the bank?

3 MR. WOLLEN: Yes, sir.

4 THE COURT: Does the plaintiff admit that
5 Mr. Jeffers didn't remember that conversation?

6 MR. BICKS: No, no. Sir, may I give you the
7 facts on Mr. Jeffers? Mr. Jeffers testified before the
8 SEC. Mr. Jeffers denied he ever heard of Topper. Okay?
9 Up to 1972.

10 THE COURT: If Mr. Jeffers had testified to that
11 effect, I wouldn't draw these inferences. That wouldn't
12 disturb me at all.

13 MR. BICKS: He didn't though.

14 THE COURT: The record before me is Mr. Jeffers
15 just has not testified to anything. If Mr. Jeffers got on
16 the stand and said, "I have no recollection whatever of
17 this conversation with Thompson", I would have believed him.
18 I don't see any particular reason he should have had such
19 a recollection. But your failure to call him leads me
20 to believe that I have got to accept Thompson's version of
21 it.

22 MR. WOLLEN: With respect to that, your Honor,
23 all I can say is that Mr. Jeffers' SEC testimony --

24 THE COURT: The SEC testimony isn't the
25 record before me, nor is it subject to cross examination.

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2 MR. WOLLEN: But it's there.

3 THE COURT: That is not subject to cross examina-
4 tion. If Mr. Jeffers had gotten on the witness stand and
5 said "I have no recollection of that conversation with
6 Mr. Thompson," and he had stood up on cross examination,
7 I would have believed him, because that is perfectly
8 logical to me. But he is not on the stand. Therefore,
9 I accept Mr. Thompson's statement that it's Mr. Jeffers who
10 selected Waldman as the person to talk to him.

11 What legal consequences flow from that, I am
12 not sure, but it certainly looks to me significant,
13 because certainly Mr. Bicks thinks they are significant,
14 because he dwelled on it for a good ten minutes in his
15 opening, and I think it's significant. What result follows
16 from it is another question.

17 MR. WOLLEN: With respect to that --

18 THE COURT: It seems to be very improbable,
19 but on the record before me I have to find it.

20 MR. WOLLEN: With respect to that, a couple
21 of points.

22 No. 1, Mr. Mole testified that he told Mr.
23 Thompson to get in touch with the man on top of Topper.

24 THE COURT: That's right, and Mr. Thompson
25 said he interpreted that as to find out who that man is

1 jhbr 13

2 from Jeffers.

3 MR. WOLLEN: That's correct. Secondly,
4 Mr. Thompson testified that he knew that he needed input
5 from Mr. Waldman.

6 THE COURT: I know that. All those things make
7 it highly improbable in my view that Mr. Thompson's testi-
8 mony is correct.

9 However, you elected not to dispute it. The
10 man who could have disputed it is in your hundred percent
11 control. I told you I thought it was significant.
12 You didn't call him. My only conclusion is that he would
13 have supported Thompson's testimony. It seems to me I am
14 bound to draw that conclusion.

15 MR. WOLLEN: Fine.

16 Thirdly, Mr. Thompson testified that he told
17 Mr. Jeffers that Topper was in the secured part --

18 THE COURT: That's correct, but he didn't
19 tell him which member of the secured thing. The delight-
20 ful possibility is open that Mr. Jeffers called Mr. Siegel
21 and said, "I want you to call Thompson" and Siegel said
22 "Oh, my God, if I call him the deal is off. Find somebody
23 that is stupid."

24 MR. WOLLEN: The second point, Mr. Bicks said
25 in his statements that he considered this to be a

1 jhbr 14

2 garden variety 10b-5 case. That is exactly what he said.

3 THE COURT: : It's sure not garden variety.

4 MR. WOLLEN: Secondly, on that same point,
5 he said that what Mr. ~~Wollen~~ ^{Waldman} thought or what his state of
6 mind was is irrelevant, and in my mind the two are just
7 inconsistent. At least, in this circuit what Mr. Waldman
8 and others thought is certainly relevant in the garden
9 variety 10b-5 case.

10 THE COURT: I agree with you, except on this
11 theory that Mr. Last has come up with.

12 MR. WOLLEN: Thirdly, on the question of whether
13 this was a routine credit check, I simply want to call to
14 your Honor's attention that there is an abundance of evidence
15 in the record which I will not now characterize but which
16 we will be bringing to your attention in connection with
17 our findings of fact which even further ~~substantiate~~ ^{substantiate} that
18 conclusion.

19 Finally, your Honor, on Mr. Last's point, you
20 twice I think described what happened with respect to the
21 \$3 million over-advance and its connection with the
22 ^P Private ^P Placement as the bank told Topper to get the
23 ^P Private ^P Placement and Citibank started Topper on its
24 course.

25 Now, I just have to say for the record that

1 jhbr 15

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2 I don't think the record supports those facts or inferences
3 that could lead to that. I think the record is clear
4 that Topper told the bank about the prospects --

5 THE COURT: Yes, but as I understand the
6 testimony, the bank certainly didn't tell Topper
7 "You have got to get a private placement from U.S. Steel
8 or from anybody else."

9 The bank, it seems to me -- and as I mentioned
10 to Mr. Bicks, I wasn't focusing on this theory when the
11 case was going in, so I didn't have my recollection keyed
12 to it -- but it seems to me the evidence would support a
13 finding, which I am sure Mr. Bicks is going to formulate,
14 that in effect Topper came to Waldman and said "We need
15 \$3 million," and Waldman said "Not from me, you don't get
16 it. Get it from somewhere else." Obviously those
17 words weren't used. I don't think it's fruitful for
18 us to explore that too much because I just don't remember
19 the relevant testimony.

20 MR. WOLLEN: I was disturbed at your Honor's
21 characterization of the testimony and I wanted to just state
22 my disturbance.

23 THE COURT: Right. That is valid.

24 My last statement, obviously not in those
25 terms, is the impact of it. But I don't think it's fruitful

1 jhbr 16

2 to go into it in detail because I don't remember it.

3 ~~MR. WOLLEN~~ ^{Wollen} That is fine, your Honor.

4 I have nothing further.

5 THE COURT: Okay.

* * * * *

* * * * *

13 THE COURT: Let's put in the record as Court's
14 Exhibit 1 of this day my supplemental order of March 16th,
15 and as Court's Exhibit 2 Mr. Bick's letter of March 15th --
16 I suppose it ought to have been in the opposite order --
17 Mr. Bick's letter of March 15th, setting forth his views
18 in relation to this proceeding.

19 Shall we proceed?

20 MR. WOLLEN: Yes, your Honor. This is Mr.
21 Jeffers here.

22 (Court's Exhibits 1 and 2 marked for
xx 23 identification.)

24 THE COURT: Let the record show that I have
25 read the Securities and Exchange minutes of Mr. Jeffers.

1 jhrf 3

2 W A L T E R W I L S O N J E F F E R S ,

3 being first duly sworn, testified as

4 follows:

5 EXAMINATION BY

6 THE COURT:

7 Q As I remember from your Securities and
8 Exchange Commission testimony, you joined the bank in
9 '36.

10 A Yes, sir.

11 Q That I assume was the First National Bank.

12 A At that time it was the National City Bank.

13 Q You joined the National City Bank, not the
14 First ~~Nation~~ ^{National?}

15 A That's right.

16 Q I just assumed it was the First National
17 from the character of your work.

18 Were you always in the investment phase of
19 the bank?

20 A No, I was never in the investment part of the
21 bank. Well, I was in the bank's own Bond Department, which
22 handled the bank's, in total, corporate, municipal
23 and government bond portfolio.

24 Q How would you describe --

25 A That was until 1950, when I went in the

1 jhrf 4

Jeffers-direct

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2 commercial lending end of the business.

3 Q How would you describe the position you held
4 in 1971?

5 A I was head of the Metals and Mining Department,
6 which handled major accounts, major corporate accounts,
7 in the metals and mining industries.

8 Q If --

9 A Including U. S. Steel.

10 Q You were handling it as a corporate account?

11 A That's right, as a commercial account, as we
12 call it.

13 Q As a commercial account?

14 A Yes.

15 Q The bank I assume had investment accounts?

16 A Just the bank's own bond portfolio.

17 Q The bank acted as trustee for certain funds,
18 I assume.

19 A Oh, yes. But I never was in that end of the
20 business.

21 Q You weren't in that end of the business?

22 A No.

23 Q Does the bank also act as custodian with
24 responsibility for investing?

25 Clearly if I established a living trust

1 jhrf 5

Jeffers-direct

2 and the bank was trustee the bank would then, having
3 accepted the trust, would then have to invest and reinvest,
4 would it not?

5 A If those were your instructions.

6 Q If you were trustee.

7 A I am trying to differentiate between a case
8 where they would be a trustee but you would instruct
9 that somebody else be the investment manager.

10 Q That is what I am trying to get at. We are
11 going in the same direction.

12 We start off with the fact the bank is just
13 trustee, with no provision restraining it, it is just a
14 trustee like any other trustee, a trust say of a quarter
15 of a million or whatever.

16 A Yes, that's right.

17 Q It would have to administer that trust just
18 like its own funds and invest and reinvest?

19 A Right.

20 Q You mentioned the trust could have an instruc-
21 tion that the bank hold custody but take its investment
22 advice from some investment manager?

23 A That's right. So I understand. I have
24 never been directly involved.

25 Q Are there also situations where the bank is

1 jhrf 6

Jeffers-direct

2 investment manager? Could I put my funds, assuming
3 I had any, in the bank with instructions just to manage
4 them for me?

5 A Oh, yes. Whether a trust or your own port-
6 folio.

7 Q You had nothing to do with that phase of the
8 bank's business?

9 A No, sir.

10 Q As I recollect from your testimony, United
11 States Steel had been -- what do you call them, client
12 or customer?

13 A Both.

14 Q -- for some years?

15 A The bank's customer.

16 Q How long had they been under your --

17 A Beginning either April or May -- I don't
18 remember which -- 1970.

19 Q When did you first meet Mr. Mole?

20 A I would have to guess it was at the first
21 meeting after I took over the department management. We
22 had quarterly meetings with Mr. Mole and generally two
23 of his associates and these were almost always early
24 in each calendar quarter and I probably missed the one
25 in April. Therefore, I would guess it was the one

1 jhrf 7 Jeffers-direct

2 in July, end of June. That one got moved up because of
3 vacations.

4 Q So you met him quarterly thereafter at these
5 meetings?

6 A That's right.

7 Q Did you have any other contact with him?

8 A Not that I remember.

9 Q You had no social contact with him?

10 A Oh, no, no.

11 Q Mr. Thompson had testified that he came to
12 one or two -- I forget how many -- of those meetings,
13 those quarterly meetings. Do you recollect that?

14 A It would depend a little bit on what period.
15 At some point -- I don't remember what year this was --
16 Mr. Mole retired and there was a general move up and I
17 have a feeling that in the four years, approximately, that
18 I handled or the department handled the account, it was
19 toward the end of that period that Mr. Thompson became
20 a fairly regular attender at these meetings, whereas
21 maybe the first two years he might have been there once
22 or twice.

23 Q When is your first recollection of your
24 having talked to Mr. Mole about the pension funds upsetment,
25 shall we call it, with the Topper investment?

jhrf 8

Jeffers-direct

1
2 A Well, that would have been sometime after he
3 contacted Mr. Wriston. Mr. Wriston's secretary wanted --
4 phoned me or somebody in my department. I tend to
5 remember things as, you know, the bank, whether I was in-
6 volved or one of my associates was involved. We answer
7 each other's phones and whatnot if the person asked for
8 isn't there. And Mr. Wriston's secretary, I believe, when
9 Mr. Mole said he wanted to see him, phoned me as head
10 of the department to find out why Mr. Mole would want to see
11 Mr. Wriston, and that I guess would have been February
12 '72, somewhere in there, and it wasn't until that meeting
13 had taken place and Mr. Wriston had said, "Well, we will
14 make the head of our what we call Credit Policy Committee,"
15 who at that time I believe was Lester Garvin, "your chief
16 contact, Mr. Mole, on this question."

17 And sometime after that, I don't know how
18 long, if I recall, we had a meeting of Mr. Garvin, Mr.
19 Mole and myself.

20 That was the first time I had been involved
21 in any direct discussions with Mr. Mole on the subject.

22 Q I guess I misunderstood. You didn't telephone
23 Mr. Mole to find out why he was coming?

24 A No, I did not.

25 Q That discussion was a subject of a memorandum.

1 jhrf 9

Jeffers-direct

2 THE COURT: Was that memorandum offered in
3 evidence?

4 MR. BICKS: Yes.

5 THE COURT: What was the exhibit number? Have
6 you got a copy of it here? I thought I remembered having
7 read it.

8 Q That discussion was a subject of a memorandum
9 which was referred to in the SEC testimony.

10 A Yes, sir. I wrote a memorandum at about that
11 point just to sort of have a record of what this was
12 all about in case it ever came up again.

13 Q My order directed that you produce any
14 office diaries of this period. You said at the SEC
15 that you had no diaries, but if you had made a luncheon
16 appointment that must have gone somewhere.

17 A Just on my calendar.

18 Q What has happened to the calendar?

19 A Well, I retired the end of January and threw
20 away all old material to clean the decks for my successor,
21 plus which my calendar is one that I would try to keep
22 for a year or two and as I put a new used up one in I
23 would throw away the old one, so I would never have
24 more than one or at the most two back years calendars
25 on hand, and I threw those away when I retired.

1 jhrf 10

Jeffers-direct

2 Q I take it you were prepared for this SEC
3 testimony. I gather there had been a meeting between
4 you and --

5 A Yes, with counsel. I believe at that time
6 I did have the 1971 calendar. There was no trace of
7 anything about this, any Topper conversations with me,
8 Waldmann, Mole, Thompson, anybody. It is not the sort of
9 thing I would normally put on my calendar.

10 Normally I would have a piece of paper and
11 I would scribble down what the message was. I keep a
12 stack of those pieces of paper for two or three months
13 maybe and go through them every once in a while just to
14 whittle them down. That would have been the only diary.
15 But that stack was constantly turning over.

16 Q This SEC testimony I recollect was about two
17 years after the event.

18 A It was in 1973, I understand. I don't know
19 how --

20 Q June 3, 1973 was the testimony. Was it
21 August '71?

22 A Yes. I believe Mr. Mole came in in either
23 January or February '72.

24 THE COURT: Okay. I have no further questions.
25 Anyone want to ask any questions?

1 jhrf 11

Jeffers-cross

2 CROSS EXAMINATION

3 BY MR. BICKS:

4 Q Sir, for how long have you been a member of
5 the New York Society of Security Analysts?

6 A I believe it was 1941. It may have been
7 '42.

8 Q You have been a member in good standing then
9 for 35 years?

10 A Is that 35 years? I shudder at the thought.
11 I joined it shortly after I went to work for
12 our Bond Department. My then boss was a man named Alfred
13 Hayes, who later became president of the Federal Reserve,
14 and he thought it would be a worthwhile supply or source
15 of background material on some of the corporate bonds
16 that I was analyzing for our Bond Department.

17 Q Apart from membership in that, have you
18 recently had occasion to lecture on venture capital private
19 placements?

20 A I made a fair number of speeches in recent
21 years on project finance, which is -- not recent years;
22 the last year and a half or two -- which has been my
23 most recent activity with the bank. But that is neither
24 venture capital nor really investment related, in my book,
25 since mostly the exercise is to get as much bank money

jhrf 12

Jeffers-cross

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1
2 and as much Export-Import Bank money and that sort of
3 thing as you can for a billion dollar mining project.

4 Q What is the most recent forum in which you
5 participated?

6 A I made several speeches on this subject for
7 the Advance Management Research organization over the
8 last year, year and a half. I can't remember just when
9 the most recent one was. Probably back in the fall
10 sometime.

11 Q Have you done any since you retired?

12 A No, sir.

13 THE COURT: You have been on vacation, I
14 understand, ever since you retired.

15 Q What, if any, materials did you review prior
16 to your testimony today in connection with that testimony?

17 A I reread my testimony before the SEC and
18 before I went on my recent Caribbean vacation I read Mr.
19 Mole's testimony in this hearing. I believe that is where
20 it was.

21 Q You read Mr. Mole's testimony at trial?

22 A Yes.

23 Q Were you given Mr. Thompson's testimony to
24 read, too?

25 A No, I haven't seen it.

1 jhrf 13

Jeffers-cross

2 MR. BICKS: I have no questions.

3 MR. WOLLEN: Could I ask a question or two,
4 your Honor?

5 THE COURT: Yes.

6 CROSS EXAMINATION

7 BY MR. WOLLEN:

8 Q Mr. Jeffers, do you recall during your SEC
9 testimony that you were asked about a telephone call that
10 you had from Henry Thompson in August of 1971?

11 A I recall the transcript, yes.

12 Q Could you give us today your best recollection
13 of whether you received that telephone call, and if you
14 did, what was said?

15 A Well, number one, I obviously can't remember
16 a specific phone call five years ago. The best I can do
17 is guess that either I or whoever received that call,
18 what our normal procedure would be.

19 Q I don't want you to guess, Mr. Jeffers. I want
20 you to give the best you can the best recollection you
21 have as you sit here today about that telephone call.

22 A Oh, I don't have any specific recollection
23 about that phone call.

24 Q Do you have any general recollection about it?

25 A Well, one of my problems on this whole

jhrf 14

Jeffers-cross

business has been what I have learned since about it. Being responsible for the account, I tried to get the whole picture of what happened phase by phase and not particularly, you know, who took what phone call and related the message on to who else. So in my own mind I fairly clearly reconstructed the pattern, but who was involved in a specific phone call, and particularly whether it was myself or one of my associates, I can't tell you.

Q Is what you are saying that you have no recollection about the phone call?

A None of my being specifically involved myself. I think I know what happened, but I don't know who it was.

THE COURT: When you say you know what happened what do you mean?

THE WITNESS: Just by our normal procedures on an inquiry of this sort from a valued client I know what we would tend to do, and namely that would be if somebody asked us about a corporation we tend to think of it as what we call a credit inquiry, so we want to find out who handles the account being inquired about and get him involved, get him preferably to go directly to the inquiror rather than our trying to relay any information, and the normal procedure would be to identify that officer in the bank by ordering the credit file on the

jhrf 15

Jeffers-cross

name in question.

In this case the credit files did not have a credit file, as I understand it, but they did have a reference that this was handled in the Factoring Department.

So whoever took Mr. Thompson's call, if it was Mr. Thompson who called, would then have contacted the Factoring Department to find out who in the Factoring Department handled the account and asked him to phone Mr. Thompson to see if he couldn't fill him in on this what we would tend to think of as a credit inquiry, since we for years have been cautioned, if not brainwashed, on the subject of lending officers giving any investment information to anyone inside our own organization or outside.

I am afraid any one of us on the commercial lending side, when somebody asks about a name, would tend to think of it as a credit inquiry and not in any way think of it as trying to give our guess as to whether a stock is going up or down or would be a good investment or bad investment.

MR. WOLLEN: I have no further questions, your Honor.

jhrf 16

Jeffers-redirect

BY THE COURT:

Q You said in the SEC, and Mr. Waldman so testified, that you knew each other before this episode.

A Rather casually.

Q How did you come in contact with each other before this episode?

A I never did any business with Mr. Waldman, but he and I were both vice-presidents of the bank and we would see each other in the dining room, and when we first acquired that business, which you may or may not know was a factoring company owned by another holding company, and the bank acquired it I guess in the early '60s, we made quite an effort to at least shake hands with our fellow officers, and then you would see them at lunch and that sort of thing.

Maybe occasionally when neither of us had a business luncheon we would sit at the same dining table, sort of chat generally. But I never actually did any business with Mr. Waldman.

Q At least you had --

A I never had any contact with him on a specific business transaction. I would say this in its entirety is a case of doing business with him.

Q You say you would describe this as doing

1 jhrf 17 Jeffers-redirect

2 business with him?

3 A Yes, yes, sir.

4 RE CROSS EXAMINATION

5 BY MR. BICKS:

6 Q Let's go back to '71. You were the contact
7 or liaison officer between City Bank and the United States
8 Steel Pension Fund, weren't you?

9 A Not specifically designated as such. I
10 headed the department which handled the relationship.
11 I had officers under me who were the specific specified con-
12 tact officers. But a major relationship like U. S.
13 Steel tends to go from the boss' office to the junior
14 officer, depending on who wants what.

15 Q Let's be specific on this. In the course of
16 this proceeding ~~City Bank~~ ^{Citibank} has admitted that you were,
17 "The liaison between ~~City Bank~~ ^{Citibank} and United States Steel
18 Corporation and its affiliates, including the Pension Fund,"
19 in '71. Is it your testimony you didn't know you were
20 the liaison?

21 A No, I knew perfectly well what I was. I am
22 saying that from our own point of view our organization
23 calls for the designation of one officer as being the account
24 officer for a particular account.

25 Now, that doesn't necessary mean that the

jhrf 18

Jeffers-recross

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1 client in question will consider an assistant vice-president,
2 whoever that designated officer is, as their liaison.
3 They may think of a department head or Mr. Wriston or
4 whoever they want to think of as the liaison. And we
5 don't try to discourage them particularly in that. We
6 want them to feel warm and friendly and if it takes
7 Mr. Wriston to feel that way, why, fine.

8 Q Mr. Jeffers, this is an admission by ~~City~~ ^{Citibank}
9 ~~Bank~~ as to what they thought you were. My question is
10 did you consider yourself the liaison.
11

12 A I certainly was one -- I was the head of the
13 liaison group.

14 Q As of '71 you knew, did you not, that the
15 Pension Fund was paying for investment advice from ~~City~~ ^{Citibank}
16 ~~Bank~~, didn't you?

17 A That is a little hard to say. What I perceive
18 as this payment for investment advice was taken care of
19 by these quarterly meetings.

20 Q So the answer is you knew they were paying
21 for investment advice?

22 A Oh, yes.

23 Q Okay. That is what I asked you.

24 A Yes.

25 Q You also knew that the Pension Fund was not

1 jhrf 19

Jeffers-recross

2 in the business of buying or selling a product, didn't you?

3 A Yes, sir.

4 Q What business did you think the Pension Fund
5 was in?

6 A Handling U. S. Steel's pension investments.

7 Q Making investments, right?

8 A Yes, sir.

9 Q I think you testified -- and you knew that as
10 of '71?

11 A Yes, sir.

12 Q You testified, I think, that you had no
13 recollection as you sit here today of any telephone con-
14 versation with Mr. Thompson in August of 1971 concerning
15 Topper. Was that your testimony?

16 A Yes, sir.

17 Q No recollection, general or specific?

18 A Right.

19 Q So you are not in a position to say whether
20 the conversation took place and if it took place what was
21 said, is that right?

22 A Only from subsequent reports.

23 Q We will get to the subsequent reports.

24 THE COURT: From his own recollection, that
25 is his testimony.

1 jhrf 20

Jeffers-recross

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2 Q What is the subsequent report? Will you tell
3 us your first contact with Mr. Waldman on this subject
4 that you presently remember?

5 A It would have been fairly immediately subse-
6 quent to this meeting of Mr. Mole with Mr. Wriston.

7 Q What did Waldman say to you on that occasion?

8 A I suspect it was the other way around.
9 Mr. Garvin and I were trying to find out what had gone
10 on and what Waldman had said and a little bit about the
11 whole situation.

12 THE COURT: That is what he wants to know,
13 what Waldman answered you.

14 MR. BICKS: Yes, that's right.

15 Q What did Waldman say to you?

16 A Well, I suppose my questions were much re-
17 lated to "What is Topper all about, what is your relationship
18 with Topper, what did you say to Thompson, whoever it was
19 that you talked to at U. S. Steel Pension when this
20 inquiry came in?"

21 THE COURT: What Mr. Bicks wants to know is
22 what did Waldman reply to these questions of yours.

23 THE WITNESS: Well, he gave me a little
24 education in the Topper financial history of the last
25 few months which resulted in their downfall, on that score,

jhrf 21

Jeffers-recross

and he insisted that he had given U. S. Steel Pension
a more or less routine credit inquiry response on their
question.

I don't recall that I at that time even thought
to ask, "Well, did you give them any investment advice?"

I assumed that Waldman and I were on the same
wavelength there, that we don't give investment advice,
as commercial lending officers.

Q What did Waldman say to you? That is the
question.

A I don't remember specifically.

Q Do you remember generally?

A I just repeated it. Will you ask him what
just said?

bsrf 2-1

Jeffers -recross

1501

BY MR. BICKS:

Q You have exhausted your recollection as to what Waldman told you on that first occasion?

A I even relied on my imagination a little bit. I have since exhausted my recollection.

Q You indicated that you had no recollection as to what happened, but you reconstructed things based on subsequent events, right?

A No, no. You are asking me about a conversation with Waldman after Mr. Mole's visit with Mr. Wriston.

Q That is what you said is the first time you talked to him about what Topper was?

A That's right. What I am talking about reconstructing is what must have happened back there in -- if you say August '71 -- when Mr. Thompson inquired, from that time until Mr. Mole asked for his interview with Mr. Wriston.

That is reconstruction, whereas, I think I can begin to remember more clearly the specifics when this thing became an issue, as far as I was concerned, involved in a very important relationship, and that was after Mole's visit with Wriston.

Q I would like to move ahead to a meeting between yourself and Waldman shortly before your SEC

bsrf 2

Jeffers-recross

testimony, remember that?

A I find it very hard to remember phone conversations, meetings. I had very few actual meetings with Waldman, maybe one or two at the time -- immediately following Wriston's interview with Mole and then maybe one -- I'm not sure I actually saw Waldman in conjunction with the SEC testimony.

Q Let me refresh your recollection. On page 31 of your transcript you were asked, "When was the last occasion that you spoke to Mr. Waldman prior to coming here, over here today?"

A That was last week."

A That doesn't mean I saw him. Many of my conversations with Waldman were by phone. He was on a different floor, I probably had to change elevators to get there. We tended to talk on the phone.

Q The next question by your counsel was, "This was the meeting at which I was present?"

A Yes."

Does that refresh your recollection that you sat down with Mr. Waldman shortly before both of you testified before the SEC?

A I remember reading it in the transcript.

Q But you don't --

bsrf 3

Jeffers-recross

1 A I don't remember the meeting, specifically.

2 Q Do you remember sitting down with Waldman and
3 discussing what each of you was going to say before the
4 SEC?
5

6 A No.

7 Q You remember your telling Mr. Waldman what
8 you were going to say before the SEC?

9 A No.

10 Q Do you remember Mr. Waldman telling you what
11 he was going to say before the SEC?

12 A No.

13 Q You just have no recollection of the meeting
14 to which you referred to here?

15 A I remember that we spoke, but it was --
16 whether it was in a meeting or on the phone, about the
17 fact we were going to testify at the SEC.

18 Q Right.

19 THE COURT: The point is, apparently,
20 according to your testimony before the SEC, you had a
21 meeting with Mr. Lillie and Mr. Waldman sometime before.

22 Did you have a meeting with Mr. Lillie when
23 Mr. Waldman was present, that is the one he is asking you
24 about?

25 THE WITNESS: I read that, too, sir. I

1 bsrf 4

Jeffers-recross

2 don't remember --

3 THE COURT: Does that refresh your recollec-
4 tion?

5 THE WITNESS: I don't remember a meeting as
6 opposed to a telephone conversation.

7 BY MR. BICKS:

8 Q You do remember talking to Mr. Waldman about
9 the subject of your upcoming SEC testimony?

10 A Yes.

11 Q What did you say to him?

12 A I don't have any clue on that. I'm sure
13 it was just stating the fact that we were going to have
14 this and that I had very little to contribute in terms
15 of any facts or reports or even interpretations. That he
16 would have to be the main one to tell whatever went on.

17 Q Did he tell you at that time what he was
18 going to say before the SEC?

19 A I can't remember him going into any detail.
20 My recollection on this conversation or series of
21 conversations was as much a matter of finding out from
22 Mr. Lillie what it was all about, where I had to go,
23 where I had to be when. It was on a procedure -- on
24 procedural details rather than any rehearsal of any
25 testimony as such.

1 bsrf 5

Jeffers-recross

2 I don't believe I can recall any discussion
3 between Mr. Lillie and Mr. Waldman on his -- that I heard
4 any discussion of what Mr. Waldman might or might not
5 say.

6 I have a pretty total blank on anything that
7 I told anybody or that Waldman told me, on what
8 either one of us was going to say in terms of specifics.
9 I do remember, it seems to me more, as I say, a question
10 of finding out from Mr. Lillie what the procedure was.

11 Q Is it your testimony now that you recall that
12 Waldman was present when you were finding out?

13 A No, no. I read it in here.

14 THE COURT: So you assume it must be true if
15 you said it then?

16 THE WITNESS: I would have to assume my
17 recollection was better in '73 than in '76 on something
18 that happened in '71 or '72.

19 THE COURT: This was in '73?

20 THE WITNESS: I don't remember specifically,
21 no.

22 MR. BICKS: This was a week before.

23 THE WITNESS: Yes, if I said it then I
24 would have to assume, as I'm relying on that memo that
25 I wrote back there, that this was the best of my

bsrf 6

Jeffers-recross

recollection at the time, and as accurate as I can be,
and if it is even fuzzier today, it is very difficult
for me to rely on my memory to come back to me more
clearly now than it did in '73.

MR. BICKS: Thank you.

THE COURT: Anything further?

MR. WOLLEN: No, sir.

THE COURT: That is all, thank you.

(Witness excused.)

THE COURT: I will just state for the
record that probably had I read this SEC testimony first,
I wouldn't have bothered to call the meeting, contrary
to the implications of Mr. Bick's letter of March 15th,
which I can't help characterizing as rather paranoid,
it was not my intention of calling this to help the
~~City Bank~~ ^{Citibank} in any way.

Quite frankly, I thought that when ~~City Bank~~ ^{Citibank}
didn't call a witness that I had specifically suggested
be called, they were trying to hide something, and I was
trying to find out what it was.

If I had read the SEC testimony, which took
two and a quarter hours, and I must say was very thorough,
I wouldn't have thought that I could find anything that
they didn't find out.

bsrf 7

That was my purpose in calling the meeting.
As far as I am presently able to develop, I haven't
found anything I didn't know before.

Thank you, gentlemen.

(Time adjourned 10:10 a.m.)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
UNITED STATES STEEL AND CARNEGIE :
PENSION FUND, INC., CONNECTICUT MUTUAL :
LIFE INSURANCE COMPANY, et al., :
Plaintiffs-Appellants, : AFFIDAVIT OF SERVICE
-against- : ON PERSON IN CHARGE
HENRY ORENSTEIN, FIRST NATIONAL CITY :
BANK, HAYDEN STONE INC., et al., :
Defendants, :
-and- :
FIRST NATIONAL CITY BANK, :
Defendant-Appellee :
-----X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MORRIS ARNSTEIN being duly sworn, says: I am
employed in the office of Breed, Abbott & Morgan, 1 Chase
Manhattan Plaza, New York, N.Y. 10005, attorneys for the
Plaintiffs-Appellants in the above action.

On the 28th day of January, 1977, I served
the annexed JOINT APPENDIX ON APPEAL - VOLS. I - V

on the attorney(s) listed below by delivering the same to
and leaving the same with the person in charge of said office(s).

Shearman & Sterling, Esqs., Attorneys for Defendant-Appellee
53 Wall Street, New York, New York 10005

Sworn to before me this
28th day of January, 1977

Eduard J. Watrous

Morris Arnstein
Morris Arnstein